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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 CHANCE McCURDY,

4 Plaintiff,

5 v.

17 Civ. 5168 (GHW)

6 CORRECTION OFFICER J. MITCHELL  
7 and CAPTAIN OF CORRECTIONS  
8 BELL,

9 Defendants.

Jury Trial

-----x

10 New York, N.Y.  
11 September 4, 2019  
12 9:04 a.m.

13 Before:

14 HON. GREGORY H. WOODS,

15 District Judge

16 APPEARANCES

17 THE LAW OFFICE OF FRED LICHTMACHER, P.C.

18 Attorneys for Plaintiff

19 BY: FRED LICHTMACHER, ESQ.

20 NEW YORK CITY LAW DEPARTMENT

21 OFFICE OF THE CORPORATION COUNSEL

22 For Defendants

23 BY: BRACHAH GOYKADOSH, ACC

24 OMAR J. SIDDIQI, ACC  
25

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(In open court; jury not present)

THE COURT: Thank you very much, counsel. Good morning. Let's begin.

I have a number of things on the agenda.

First, all of our jurors are not yet here. My expectation is to begin promptly at 9:15, assuming that all the jurors are present.

The second thing that I should inform you of is the information that I have about Mr. McCurdy and his presentation. So my clerk called the GVRG earlier this morning. She was informed earlier this morning -- I'm not sure exactly when, shortly after 8 or 8:15 -- that he had not yet left the facility, that he is in outtake at GVRG. So I do not know when he will be here. I just got off of the phone with the Marshals to let them know that we are waiting for him and that we want him to be here promptly, and they know that as soon as he's produced to MCC that they're to bring him to the courtroom, and I worked out a protocol with them that I hope, if implemented properly, will have us know as soon as he's here so that we can take a break and so that we do not need to let the jury know that he's coming in through the side door, which is the cells. I expect he won't come into the courtroom from that cell in the presence of the jury.

MR. LICHTMACHER: Thank you, your Honor.

THE COURT: Thank you.

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1           So the other things I have to discuss are what I'm  
2 going to describe as a judicial notice issue, and I also  
3 received the series of redactions from Exhibit 8. I understand  
4 there are no proposed redactions to Exhibit 14.

5           Counsel, is this set of redactions comprehensive or is  
6 there anything that remains to be discussed during our brief  
7 window prior to the arrival of our jurors?

8           MS. GOYKADOSH: May I respond, your Honor?

9           THE COURT: Yes.

10          MS. GOYKADOSH: So two things.

11          The first is, with regards to Exhibit 14,  
12 Mr. Lichtmacher informed me yesterday that he will not be using  
13 that exhibit in part of the trial, so that is why there are no  
14 redactions to that exhibit.

15          With regards to Exhibit 8, the parties conferred  
16 yesterday and were able to reach resolution on almost  
17 everything. Defendants have two areas of dispute that we just  
18 wanted to raise for the Court, but besides that, we are there,  
19 I think.

20          THE COURT: Good. Thank you.

21          So let's take each of those up, unless there's  
22 something else that the parties would like to raise with the  
23 Court before the jury arrives.

24          Counsel, anything else that we should add to the  
25 agenda before we begin our discussion of Exhibit 8?

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1 MR. SIDDIQI: Your Honor, I have a very quick,  
2 slightly strange question. In the opening, I plan to use  
3 quotations from certain records that have curse words in them.  
4 I was wondering if your Honor has a preference of whether I can  
5 say the curse word or I should say "F word."

6 THE COURT: Thank you. That's a fair question.

7 MR. LICHTMACHER: May I be heard on this, your Honor.

8 THE COURT: Yes.

9 MR. LICHTMACHER: To the extent that we're going to be  
10 told that that appears on documents, and no documents like that  
11 have been offered in the JPTO, I would object to them being  
12 referred to as being from a document, so if there's a document  
13 where that has it and it's been stippled into evidence, I  
14 wouldn't object, but since nothing's been stippled into  
15 evidence, you know, referring to such a document would be  
16 inappropriate.

17 THE COURT: Thank you.

18 MR. SIDDIQI: And I apologize, your Honor. What I  
19 meant to say, it's something that's going to come out in  
20 Officer Mitchell's testimony from his memory.

21 THE COURT: Thank you.

22 A few things. First, obviously opening statements are  
23 not themselves evidence. Counsel is well warned and well  
24 advised not to misstate the anticipated facts. Jurors remember  
25 it, and opposing counsel have a way to remind the jury when

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1 counsel states facts in their openings that do not prove  
2 themselves during the course of trial. So I make that comment  
3 at the outset.

4 With respect to the use of curse words, my personal  
5 preference is that they not be used because this is a  
6 courtroom. That's my preference, but it's far from my mandate.  
7 I will not prohibit you from using curse words. You should  
8 make your own decisions about how best to choose your language.  
9 If the language that you're going to use will come into  
10 evidence, I will permit you to use it. Frequently counsel  
11 choose not to use such language in part out of respect for the  
12 sensitivity of the jurors and for concern about whether  
13 particular jurors may find the association with such language  
14 to be adverse. That kind of consideration is something I will  
15 leave to the good judgment of counsel.

16 In sum, you should feel free to use whatever language  
17 that you believe is appropriate in order to make your point.  
18 You're aware of the potential concerns. I will let you make  
19 that call, ultimately, yourself.

20 MR. SIDDIQI: Thank you for your guidance, your Honor.

21 THE COURT: Thank you.

22 Good. So thank you very much for raising the  
23 question. I appreciate it.

24 Counsel for plaintiff, any additional issues that  
25 you'd like to raise before we begin a discussion of the

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1 Exhibit 8?

2 MR. LICHTMACHER: Well, the same issue. I'm just  
3 concerned that anything that is not in evidence yet will be  
4 discussed as if it is in evidence. It goes for more than just  
5 the one thing. It's a little hard to put that cat back in the  
6 bag if in fact your Honor does not admit into evidence in court  
7 whatever they're going to say. So that is my lone request.

8 Actually, one other thing. The language, in terms of  
9 referring to him as a rapist, I think the Court was kind of  
10 clear about it, but I'd love to go over what kind of language  
11 they're going to be allowed to use.

12 THE COURT: Thank you. Please proceed.

13 MR. LICHTMACHER: Not a juror. Okay.

14 THE COURT: I just wanted to make sure the door was  
15 not open as you were using that word.

16 MR. LICHTMACHER: So I would just like to go over, you  
17 know, specifically what your instruction is to that type of  
18 language being used. I think you mentioned the frequency of  
19 it, I believe, in our last meeting. I believe that's what you  
20 said.

21 THE COURT: Thank you.

22 MR. LICHTMACHER: Or if we could have some clarity,  
23 I'd appreciate it.

24 THE COURT: Thank you. Yes, I'd be happy to reprise  
25 our discussion from before.

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1 In sum, I permitted the defense to introduce what I  
2 described as the pedigree of the criminal offenses with which  
3 he was convicted. Those convictions in their basic pedigree  
4 include the word "rape." However, I directed that they not use  
5 the word "rapist" throughout the course of the discussion of  
6 the rationale, why it was that the officer and Captain Bell did  
7 not believe that he'd be an effective interlocutor with the  
8 remaining jail population. Instead, I directed that they use  
9 the less inflammatory term "sex offender."

10 MR. LICHTMACHER: Thank you, your Honor.

11 THE COURT: Thank you. Good.

12 MR. LICHTMACHER: Just so you know, that was  
13 Mr. McCurdy's mother with his clothing. I didn't mean to get  
14 up. I don't want to be rude. But I know she has to run to  
15 work.

16 THE COURT: That's fine. That's not a problem. Thank  
17 you very much. The Marshals may want to look at the clothing  
18 before he uses it, before it's handed back to them. We'll set  
19 up a process to allow them to do whatever they think is  
20 appropriate from a security perspective before the clothing is  
21 handed back to him.

22 MR. LICHTMACHER: I'm aware of the procedure, your  
23 Honor, of course.

24 THE COURT: Thank you.

25 So give me one moment, please, counsel.

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1           Good. So counsel for defendants, please let me know  
2 what the issues are that you'd like to discuss with respect to  
3 the proposed redactions to Exhibit 8. Counsel.

4           MS. GOYKADOSH: Yes, your Honor.

5           So the first issue, it appears globally throughout,  
6 but the best page to look at is page D000775, and that's the  
7 page with the radiology results for the wrist, and we agreed  
8 that the words "cortical step-off" should be taken out.  
9 Defendants also proposed that the words "which may suggest a  
10 fracture" should also be taken out because it links back to the  
11 "cortical step-off," and it's misleading to the jury. So the  
12 parties were unable to come to a resolution as to that.

13           Would your Honor like me to state the second issue as  
14 well now?

15           THE COURT: Thank you. Please do.

16           MS. GOYKADOSH: And the second issue, again, this  
17 appears globally throughout, but the best page to look at is  
18 D000783. This is a page that is the radiology results for the  
19 head CT, and there are two paragraphs on that page that say  
20 "Finding." The second paragraph on that page that says  
21 "Finding" says, "There may be a slight buckling of the lateral  
22 wall of the right maxillary sinus." We proposed that that  
23 sentence be taken out. We do not believe that the concept, or  
24 the term, actually, the medical terminology "buckling" is  
25 within the province of the jury. Plaintiff's counsel



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disagrees, so that's the second area of dispute.

THE COURT: Thank you.

The question is the word "buckling" in this context, is that correct?

MS. GOYKADOSH: Correct, your Honor.

THE COURT: Thank you. Good.

So the jurors are all here. Counsel for plaintiff, any argument with respect to each of these issues? And then I will invite us to begin. Counsel, any arguments on this? I'll consider it while you're opening.

MR. LICHTMACHER: Sure.

First of all, for the "buckling," it's plain English, "buckling."

THE COURT: Thank you.

MR. LICHTMACHER: It is simple.

Secondly, I understand the "step-off" argument, but the other part, you know, he may have a fracture, that's plain English that I don't need a doctor to bring in.

And by the way, this is why I didn't bring a doctor in. I consulted one. You know, this is plain English. These are easy to read. There are some things that are medical terms that we did agree to redact, and a substantial number of redactions, as you saw from the submission. But, you know, indicating that something may be fractured, we talked about yesterday. That goes to his emotional harm, oh, my god, I may

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1 have a fracture, you know; and the buckling of the wall, he  
2 thinks he has a fracture in part of his head, and he does  
3 indicate that those parts of his body were parts where he was  
4 beaten. So I think they're plain English, they don't need an  
5 expert, and they should come in.

6 THE COURT: Thank you. Good. I'll consider this.

7 Counsel, before we bring in the jury, let me -- and  
8 I'll come back and give you a ruling on it promptly. I don't  
9 understand these exhibits will come in during the first two  
10 witnesses' testimony.

11 Counsel for plaintiff, first, would you like for me to  
12 give the same kind of instruction that I gave during the voir  
13 dire process yesterday -- namely, that Mr. McCurdy is not here  
14 through no fault of his own, that they are not to hold the fact  
15 that he is not present against him in any way, and that they're  
16 not to speculate as to the reasons why he's not here? Is that  
17 helpful, from your perspective? I'd be happy to repeat it if  
18 you believe it would be beneficial.

19 MR. LICHTMACHER: I think it's helpful. I think it's  
20 generous of the Court, particularly in light of the fact that  
21 this was my fault, so I appreciate it greatly.

22 THE COURT: Thank you. I'd be happy to do that.

23 MR. LICHTMACHER: Thank you.

24 THE COURT: Counsel, do you need a ruling with respect  
25 to the judicial notice issue before you open? I can provide

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1 you one if you like, but I'd also like to begin promptly if it  
2 turns on whether or not it's included in your opening.

3 MR. LICHTMACHER: It will be included in my opening  
4 depending on the ruling. But I would certainly also hope we  
5 get a very short nature break before we start, your Honor.  
6 Very short.

7 THE COURT: Fine. If it's very short, that's fine.

8 So let me take up the issue first regarding the  
9 request that I take judicial notice of NYC Penal Law  
10 Section 120.08. I'm going to refer to this as the request that  
11 I take judicial notice of the statute, but I use that largely  
12 as a term to refer to the issue that it provokes. That  
13 request, like Helen, launches a thousand ships. The purpose of  
14 the request that I take judicial notice of the statute is to  
15 facilitate an argument that, as I understand it, if the  
16 incident occurred as the officers stated, then there would have  
17 been a prosecution or a referral for prosecution and that the  
18 investigation process that ensued would have resulted in the  
19 acquisition of sworn statements and that, therefore, presumably  
20 the officers may not have referred the incident for prosecution  
21 because they did not want to provide such sworn statements; and  
22 also to show that perhaps the incident itself did not occur  
23 because the plaintiff was not prosecuted for it. So I agree  
24 with the defendants that I should not take judicial notice of  
25 the statute. And I use that, again, as a heading for

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1 commentary regarding what I understand to be the broader set of  
2 arguments that the plaintiff would like to introduce that are  
3 prompted by the request.

4 First, the fact of nonprosecution of the plaintiff  
5 with respect to this incident has very little probative value,  
6 if any. There are many reasons why criminal acts are not  
7 prosecuted. Counsel for defendants proffered yesterday that  
8 the officers are not the people who make the prosecution  
9 decision. Extrapolating from the fact of nonprosecution that  
10 the reason for the nonprosecution was that the incident did not  
11 occur is very tenuous and calls for the jury to speculate. To  
12 the extent that the proposed evidence of the nature of this  
13 offense has any probative value, it's substantially outweighed  
14 by the risk of juror confusion and the risk of wasting time --  
15 the risk of juror confusion and wasting time in part because it  
16 would require, as counsel for the defendants described  
17 yesterday, a mini trial about the nature and circumstances of  
18 DA referrals generally, the process that they use, the  
19 inferences that they, the jury, can draw from that, all of  
20 which I am concerned would be time-consuming. And I also am  
21 somewhat concerned we do not have witnesses who can testify to  
22 it in depth, leaving the jury in a position to be required to  
23 speculate in order to reach the kind of inferences that  
24 plaintiff suggests.

25 I believe that the introduction of this line is also

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Opening - Mr. Lichtmacher

1 prejudicial for substantially the reasons that I've just  
2 described and that those prejudicial risks, together with the  
3 risk of juror confusion and the risk of wasting time,  
4 substantially outweigh what I view is the very minor probative  
5 value of the evidence.

6 So counsel, let's take a very short rest break. My  
7 clerk will let the jury know that we'll be starting  
8 momentarily, so please be back here as promptly as you can.  
9 I'm going to step down during this short break. Thank you.

10 MR. LICHTMACHER: Thank you, your Honor.

11 (Recess)

12 (In open court)

13 THE COURT: Thank you. You can be seated.

14 Thank you. Ms. Nelson, you can bring in the jury.

15 (Jury present)

16 THE COURT: Thank you. You can be seated.

17 So welcome back, ladies and gentlemen of the jury.  
18 Thank you very much for all being here on time. I appreciate  
19 it.

20 So we're about to begin the trial. One thing that  
21 you'll note is that Mr. McCurdy is not here. He's not here  
22 through no fault of his own. So again, I'm going to instruct  
23 you not to hold the fact that he's not currently present in the  
24 courtroom against him in any way in your deliberations and also  
25 that you're not to speculate as to the reasons why he is not

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Opening - Mr. Lichtmacher

1 currently present.

2 So the first step in the trial, as I told you all  
3 yesterday, is opening statements. First we're going to hear  
4 from plaintiff's counsel, and then we will hear from counsel  
5 for defendants.

6 With that, let me ask you all to pay close attention  
7 to each of the lawyers as they give their opening statements.

8 Counsel for plaintiff.

9 MR. LICHTMACHER: Thank you, your Honor.

10 Good morning, ladies and gentlemen.

11 Now the evidence here will show the following: That  
12 on February 19, 2015, Chance McCurdy was subjected to the use  
13 of excessive force by the defendants, Corrections Officer  
14 Mitchell and Captain Bell. "Excessive force" will be defined  
15 for you by the Court, and I will not usurp the role of the  
16 Court. What we're talking about here is a beating, plain and  
17 simple; what we use in plain English, that he was beaten up and  
18 that a substantial part of that beating happened while he was  
19 in handcuffs, and as a result, he had injuries.

20 Now the evidence will show to you that the defendants  
21 were less than forthright after the incident, even to the  
22 extent of not acknowledging who was actually there when the  
23 incident took place. Mr. McCurdy was hit over several parts of  
24 his body. He's a big, strong guy, and he was in prison, no  
25 doubt, but he was hit in several places and he has several

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Opening - Mr. Lichtmacher

1 injuries, which you will hear about.

2 Now he was brought to the clinic on Rikers Island,  
3 where they created a diagram of where his injuries are located,  
4 and I hope to be able to show that to you during the trial.  
5 The clinic referred him to Elmhurst Hospital, where he was  
6 treated further. When he was released, he was given oxycodone,  
7 Percocet, ibuprofen, and something else for pain. I don't  
8 remember. Another lesser one.

9 Now inmates do not get to just ask to go to the  
10 hospital. Unlike all of us here, if we decide we don't feel  
11 well, we can get in an Uber, get in a cab, get in a subway, or  
12 get our kids, our parents to drive us. Inmates can't do that.  
13 They're brought because the correctional facility deems it  
14 appropriate to have them brought, and I'd like you to keep that  
15 in mind. We're not contesting that an inmate should be able to  
16 go when he wants to a doctor, should be able to define when he  
17 needs to be treated. We're not contesting that. That is the  
18 way it is. We accept it. It's true.

19 Nor is anyone contesting the fact of his  
20 incarceration. It's not a false arrest case. We're not saying  
21 that he's pristine, that he shouldn't have been in a jail.  
22 None of that is being argued here. I want to be clear about  
23 that.

24 I want to be clear about something else. He has a  
25 criminal record, and it includes sex offenses. So Mr. McCurdy

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Opening - Mr. Lichtmacher

1 is not what we would think of as maybe the most pristine human  
2 being. He's not somebody you'd want to live next to; he's not  
3 somebody you want your kids to be friends with; he's not the  
4 most wonderful human being, but that should make no difference  
5 to you when ruling on this. All of us here are special.  
6 Whether or not we're perfect or the greatest country in the  
7 world, we'll leave that argument to another day. That is not  
8 the point. We are all subject to the same laws. The least of  
9 us and the best of us are all subject to the same laws. And  
10 because a person is in law enforcement, doesn't automatically  
11 put him on the good guy side where they're allowed to break the  
12 law. In fact, it may do the exact opposite. It may give them  
13 an obligation, almost, to demonstrate through their behavior  
14 what lawful conduct is like.

15 Mr. McCurdy, we acknowledge, is not a lawful person.  
16 He's a person who's had problems, and you'll hear about them,  
17 but it does not mean that he should be beaten up. If  
18 Mr. McCurdy doesn't have the same rights as the rest of us,  
19 what's to stop the rest of our rights from being taken away  
20 from us? Nothing. The law either applies to all of us or it  
21 applies to none of us.

22 MR. SIDDIQI: Objection.

23 THE COURT: Thank you. Sustained.

24 Please continue.

25 MR. LICHTMACHER: Now we're not here to hear about



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Opening - Mr. Lichtmacher

1 who's the good guys and who's the bad guys. Mr. McCurdy is  
2 clearly, what I said, by all civilized standards, not one of  
3 the best of us, but in this particular instance, the defendants  
4 will be shown to have acted far worse than Mr. McCurdy did.

5 Now I have no doubt the defendants will say: It's all  
6 about the money, it's all about the money. No, it's not. Not  
7 for you it's not. For you it's about the difference between  
8 right and wrong, distinguishing good people and bad people.

9 MR. SIDDIQI: Objection.

10 THE COURT: Thank you. Sustained.

11 Please refrain from argument during opening  
12 statements, counsel.

13 MR. LICHTMACHER: Now one day, almost every person in  
14 jail will walk the streets among us. We would hope at that  
15 point they know more about what good behavior is and bad  
16 behavior. We would hope so. We would hope they understand  
17 there's a difference between good guys and bad guys. If the  
18 lesson in jail is beating and lying is --

19 MR. SIDDIQI: Objection.

20 THE COURT: Thank you. Proceed, counsel.

21 MR. LICHTMACHER: If the lesson in jail is beating and  
22 lying is acceptable, what do we get when inmates get out?

23 Now you're in a position here to determine whose  
24 behavior was more appropriate. I'm probably asking you to go  
25 against every instinct you have. I'm probably asking you to

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Opening - Mr. Lichtmacher

1 find for somebody that you may not like, and I'm probably  
2 asking you to find against people that you may see as  
3 protecting you. But that is exactly what I'm asking you to do.  
4 And the reason is, what matters is what happened during this  
5 incident, and nothing else.

6 Now they say that getting a summons to appear for jury  
7 duty is sort of like being told you have to go to a job  
8 interview for a job you don't want. We understand that.  
9 Believe it or not, the lawyers get these same things that you  
10 got. We appreciate you showing up and doing your civic duty.  
11 It's an important responsibility.

12 And this is an important case. It's important because  
13 of the principles we're talking about, that our rights belong  
14 to everybody. Now I urge you, in all our best interests, after  
15 you've heard the evidence, to act not on who you like more but  
16 of what you think actually happened, because that's what's  
17 important.

18 Now being a member of law enforcement is a noble  
19 undertaking. I will not try to undermine that; I will not try  
20 to berate that. But nevertheless, they have the same  
21 responsibility to be lawful as the rest of us have. And when  
22 they are not, we are in the unique position -- and most  
23 countries do not allow this. We're in a unique position of  
24 bringing them into court and telling them that they did wrong,  
25 if in fact you find that they did wrong.

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Opening - Mr. Lichtmacher

1 Now I'm not going to demean law enforcement generally,  
2 and I mean that. We're going to distinguish what these people  
3 have done to what good members of law enforcement hopefully act  
4 like.

5 MR. SIDDIQI: Objection.

6 THE COURT: Thank you. Sustained.

7 MR. LICHTMACHER: Now you will only hear from  
8 Mr. McCurdy on Mr. McCurdy's behalf, nobody else. He's the  
9 only one you're going to hear from. He's in a jail. There  
10 aren't witnesses walking the street. There were no video  
11 cameras that took pictures of what was happening.

12 MR. SIDDIQI: Objection.

13 THE COURT: Thank you. You can proceed, counsel.

14 MR. LICHTMACHER: There were no video cameras of what  
15 was happening. There was Mr. McCurdy and a group of correction  
16 personnel, and that's all. So you will hear only from  
17 Mr. McCurdy, and I'm sure that what you will hear from the  
18 correction officers will be completely different from what you  
19 hear from Mr. McCurdy. They're completely distinguishable.  
20 And we're counting on you to be able to do something very  
21 difficult -- to see the truth even if it doesn't come from a  
22 source that you admire, but see the truth based on what the  
23 evidence shows. Do not listen to maybe four or five people who  
24 walk in and say, he did all these bad things and have one guy  
25 that you may look at as a very bad guy come in --

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Opening - Mr. Siddiqi

1 MR. SIDDIQI: Objection.

2 THE COURT: Thank you. Sustained.

3 MR. LICHTMACHER: We are hoping you can listen to what  
4 Mr. McCurdy says and listen to what all these correction  
5 officers probably will say and determine who's telling the  
6 truth -- not who you like more, but who is telling the truth,  
7 because that's what really matters here. That's what makes us  
8 who we are as a people.

9 MR. SIDDIQI: Objection.

10 MR. LICHTMACHER: Thank you.

11 THE COURT: Thank you.

12 Counsel, you can proceed.

13 MR. SIDDIQI: Thank you, your Honor.

14 Good morning, ladies and gentlemen of the jury. May  
15 it please the Court.

16 On February 19, 2015, at Rikers Island, correction  
17 officers were looking for a scalpel that had been used in a  
18 violent slashing. Slashing. Officers were going cell by cell  
19 searching for that weapon. Officer Mitchell came to the cell  
20 of the plaintiff, Chance McCurdy, to search him. Instead of  
21 being searched, plaintiff yelled "F you. I'm going to cut one  
22 of you." He then threw his T-shirt at Officer Mitchell's face  
23 to blind him and then sucker-punched Officer Mitchell in the  
24 face. And now we're here for a federal civil rights trial  
25 because plaintiff wants you to pay him for refusing orders and

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Opening - Mr. Siddiqi

1 punching Officer Mitchell in the face.

2 Ladies and gentlemen of the jury, to understand this  
3 case, you have to understand Rikers Island. Rikers Island is a  
4 jail; it's a correctional facility. It is not a school; it's  
5 not an office; it's not a hotel. Some people at Rikers are  
6 awaiting trial; some people at Rikers are awaiting sentencing;  
7 some people at Rikers, like plaintiff, have already been  
8 convicted of violent crimes. Plaintiff is a convicted violent  
9 sexual offender.

10 At Rikers, there are gangs. There are gang members --

11 MR. LICHTMACHER: Objection, your Honor.

12 THE COURT: Thank you. Sustained.

13 Please proceed.

14 MR. SIDDIQI: Plaintiff is one of those gang members.

15 MR. LICHTMACHER: Objection, your Honor.

16 THE COURT: Thank you. Counsel, you can proceed.

17 MR. SIDDIQI: He's a member of the Bloods, a violent  
18 gang that operates on the street and in jail.

19 Unfortunately, from time to time weapons are smuggled  
20 into Rikers Island. On February 19, 2015, a smuggled weapon  
21 was used in a violent slashing.

22 At Rikers Island, the inmates are required to follow  
23 the orders of correction officers so that everyone is safe.  
24 When those orders are not followed, when inmates act like  
25 plaintiff, then everyone in the facility is placed in danger.

J941mcc1

Opening - Mr. Siddiqi

1           On February 19, 2015, there was a slashing in the  
2 commissary area of the Anna M. Kross Center, which is also  
3 known as AMKC. It's a facility on Rikers Island. The  
4 commissary is where inmates can go to buy snacks or toiletries  
5 or other kinds of food.

6           The slashing was done using a surgical scalpel, the  
7 kind that doctors use, and it had been smuggled into the  
8 facility. So the officers now had a duty to try to find that  
9 weapon and make sure that no inmates were hiding other weapons.  
10 So the facility was shut down and the inmates were sent back to  
11 their respective housing areas so they could be searched for  
12 weapons and any other contraband.

13           Chance McCurdy was one of those inmates. He went back  
14 to his housing area, but for some reason he did not want to be  
15 searched. He knew from the moment he got to his cell that he  
16 was going to make trouble. He told the officers -- and these  
17 are his words -- "If I get cuffed, I might as well do  
18 something, right?" The officers took the inmates back to their  
19 cells to conduct strip searches. You're going to learn that in  
20 a strip search, officers search the outside and the inside of  
21 an inmate's body to see if they're hiding any weapons. This is  
22 because inmates sometimes hide knives, shivs, and other  
23 weapons, like scalpels, inside their body. The only way to  
24 check if there's contraband is to strip search.

25           Now Captain Bell was nowhere near the search, and the

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Opening - Mr. Siddiqi

1 reason for that is that female DOC staff is not allowed to view  
2 the strip search of male inmates, just like male DOC staff  
3 cannot view the search of female inmates.

4 Plaintiff was angry that he was going to be searched,  
5 and so he decided to lash out. He lashed out at Officer  
6 Mitchell. When Officer Mitchell ordered the plaintiff to start  
7 taking his clothing off, plaintiff yelled, "I'm not stripping.  
8 F you. It's lit." Meaning it's time to fight. Officer  
9 Mitchell continued to try to give verbal orders to the  
10 plaintiff to comply, but the plaintiff continued to disobey.  
11 Finally, plaintiff yelled, "F you. I'm going to cut one of  
12 you." Plaintiff said this at the same time that there had just  
13 been a slashing in the facility and the officers were looking  
14 for the weapon. It was at that moment that the plaintiff took  
15 off his T-shirt, threw it at Officer Mitchell's face and then  
16 sucker-punched him, right in the face.

17 Ladies and gentlemen of the jury, I want you to  
18 consider how dangerous this is. A violent inmate is attacking  
19 an officer. Plaintiff is bigger than Officer Mitchell. There  
20 were other inmates all around. If Officer Mitchell had waited  
21 for even a moment and let the plaintiff attack him further, he  
22 could have been horribly injured and the situation could have  
23 turned into anarchy. The only thing that Officer Mitchell  
24 could do was to hit back, and so Officer Mitchell reacted  
25 within reason; he punched the plaintiff's back. He punched

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Opening - Mr. Siddiqi

1 plaintiff's back in an effort to regain control of this  
2 situation. But the plaintiff did not comply. He kept  
3 fighting. He kept lashing out and being violent. And another  
4 officer, Officer Cutler, who is not a party to this case, had  
5 to rush into the cell to help Officer Mitchell.

6 But even these two officers had trouble controlling  
7 the plaintiff. He was fighting, and they were moving all  
8 around this small cell. They were bumping into the toilet,  
9 into the sink, into the bed, into the wall. Finally, the  
10 officers were able to bring the plaintiff down to the floor,  
11 but he kept fighting even then. The officers were eventually  
12 able to get the plaintiff into handcuffs. They handed the  
13 plaintiff to other officers, who took him out of the housing  
14 area, into the clinic.

15 Officer Mitchell was injured due to the punch he  
16 received from the plaintiff.

17 Now the only time that Captain Bell saw the plaintiff  
18 during this incident was for a moment when he came out of the  
19 cell. Her only focus was to get the plaintiff out of the  
20 housing area and to regain control of the situation.

21 That's everything that happened. That's the whole  
22 story. It is simple and it's straightforward because it's the  
23 truth.

24 Now you just heard plaintiff's counsel's opening  
25 statement. Let me just say this. Plaintiff is going to tell



J941mcc1

Mitchell - Direct

1 you that several grown men beat him, that they stomped on him,  
2 that they punched him, and that they kicked him. He's going to  
3 tell you that Officer Mitchell kicked him square in the face.  
4 But the objective medical evidence is not going to show any  
5 injury that is consistent with that kind of abuse. The medical  
6 evidence is going to show at best some scrapes and bruises.  
7 That's it. The injuries are not consistent with plaintiff's  
8 story because his story is made up. The injuries are  
9 consistent with what the defendants are going to tell you,  
10 because that's what actually happened. And what happened was  
11 not excessive force.

12 Ladies and gentlemen of the jury, you just heard that  
13 this case is not about money. This case is about money. This  
14 is a civil trial. Plaintiff's goal is to get money, and the  
15 way he's going to try to get money in this case is by trying to  
16 make you feel bad for him, and the way he's going to try to  
17 make you feel bad for him is by making up a story that he was  
18 beat up by officers. That is false. We're confident that you  
19 will not let the plaintiff manipulate you and that at the end  
20 of this trial, you will come to a verdict that neither Officer  
21 Mitchell nor Captain Bell used excessive force against the  
22 plaintiff.

23 Thank you.

24 THE COURT: Thank you, counsel.

25 Counsel for plaintiff, would you like to call your

J941MCC1

Mitchell - Direct

1 first witness.

2 MR. LICHTMACHER: Sure. Plaintiff calls Correction  
3 Officer Defendant Mitchell.

4 THE COURT: Thank you. Officer Mitchell, please come  
5 forward.

6 Please remain standing for a moment, Officer Mitchell.

7 Would you please state your name and spell your last  
8 name for the record.

9 THE WITNESS: Jerrel Mitchell, M-I-T-C-H-E-L-L.

10 THE COURT: Thank you. Please raise your right hand.

11

12 (Witness sworn)

13 JERREL MITCHELL,

14 called as a witness by the Plaintiff,

15 having been duly sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY MR. LICHTMACHER:

18 Q. Are you employed, sir?

19 A. Yes.

20 Q. By who?

21 A. New York City Department of Correction.

22 Q. And how long have you been with the New York City  
23 Department of Correction?

24 A. Little over six years.

25 Q. And on February 19, 2015, were you working in AMKC?

J941MCC1

Mitchell - Direct

1 A. Yes.

2 Q. Now at that point in time how long had you been with the  
3 Department of Correction?

4 A. At that time, approximately two years.

5 Q. And when you started at the Department of Correction,  
6 initially -- correct me if I'm wrong -- you are on probation,  
7 correct?

8 A. Yes.

9 Q. And how long are you on probation?

10 A. Two years.

11 Q. So at the time of this incident were you still on  
12 probation?

13 A. I don't recall.

14 Q. You don't recall? What day did you start with the  
15 Department of Correction?

16 A. May 16, 2013.

17 Q. So this would be less than two years after that, wouldn't  
18 it, February 19, 2015? Am I correct?

19 A. Yes.

20 Q. And Correction Officer is the first rank when you start off  
21 in the Department of Correction in New York City, correct?

22 A. Yes.

23 Q. And the second rank -- and correct me if I'm wrong -- is  
24 Captain, correct?

25 A. Yes.

J941MCC1

Mitchell - Direct

1 Q. So captains are supervisors, more or less, to correction  
2 officers?

3 A. Yes.

4 Q. And captains can do things like write correction officers  
5 up for inappropriate behavior if they behave inappropriately?

6 A. Yes.

7 Q. And they can have an influence over their assignment,  
8 correct?

9 A. Yes.

10 Q. And they can have some kind of influence over whether or  
11 not they get overtime, correct?

12 A. Yes.

13 Q. And they can have some kind of influence over whether or  
14 not they successfully complete probation and continue as a  
15 correction officer, correct?

16 A. Yes.

17 Q. And in fact, if you displease a captain, that captain could  
18 have a negative influence on your career, correct?

19 MR. SIDDIQI: Objection.

20 THE COURT: Thank you.

21 You can answer the question.

22 A. I guess, yes.

23 Q. And in fact, Captain Bell was the supervisor in AMKC the  
24 date of this incident, correct?

25 A. Yes.

J941MCC1

Mitchell - Direct

1 Q. And do you know her or did you know who she was before this  
2 date?

3 A. Yes.

4 Q. And at all times that you knew her, was she a person who  
5 was a superior rank to you? And I don't mean by qualitatively;  
6 I mean, was she a higher rank than you were?

7 A. Yes.

8 Q. So she was a person, according to your testimony, that  
9 could have some kind of influence over the terms and conditions  
10 of your employment at Rikers, correct?

11 A. Yes.

12 Q. And she was a person who could have some kind of influence  
13 over whether or not you successfully completed probation,  
14 correct?

15 A. Yes.

16 Q. Now prior to the date of this incident -- withdrawn.

17 Do you know what the last order rule is?

18 A. No.

19 Q. Well, is it fair to say that any captain who gives a  
20 correction officer an order, that correction officer has to  
21 abide by it?

22 A. If it's lawful, yes.

23 Q. A lawful order, correct?

24 A. Correct.

25 Q. All right. Now prior to the date of this incident,

J941MCC1

Mitchell - Direct

1 February 19, 2015, did you know someone named Chance McCurdy?

2 A. Prior to? No.

3 Q. Did you know who he was?

4 A. No.

5 Q. Had you been working at AMKC the entire time you were in  
6 corrections at that point in time?

7 A. Prior to that I was at the academy, but that was the first  
8 facility I was assigned to, yes.

9 Q. How long was the academy?

10 A. Approximately four months.

11 Q. You started in May in the academy, is that correct?

12 A. Correct.

13 Q. June, July, August, so September or so of 2013, you're in  
14 AMKC, is that correct?

15 A. Correct.

16 Q. And you worked there straight through at least till the  
17 date of this incident, correct?

18 A. Yes.

19 Q. Are you still working there?

20 A. Yes.

21 Q. So have you been there continually through this whole time?

22 A. Yes.

23 Q. And how about Captain Bell? If you know, has she been  
24 there most of the time that you've been there?

25 A. Yes.

J941MCC1

Mitchell - Direct

1 Q. Now did you ever get a chance to talk to Captain Bell about  
2 this incident?

3 A. No.

4 Q. Did she ever instruct you to say anything about this  
5 incident?

6 A. No.

7 Q. Now at some point in your encounter with Mr. McCurdy you  
8 punched him, correct?

9 A. Yes.

10 Q. And you punched him several times, didn't you?

11 A. I don't recall.

12 Q. You don't recall how many times you punched him?

13 A. No, sir.

14 Q. And did you see anybody else punch him?

15 A. No.

16 Q. So you're the only one that you saw punch him.

17 A. Yes.

18 Q. And you don't know of anyone else punching him.

19 A. No, I don't.

20 Q. You have no personal knowledge of anyone else punching him.

21 A. No.

22 Q. Is it fair to say then any injuries he got from punches  
23 would have been incurred due to what you did to him?

24 MR. SIDDIQI: Objection.

25 THE COURT: Thank you.

J941MCC1

Mitchell - Direct

1           You can answer the question.

2       A.   To the best of my knowledge, yes.

3       Q.   Because you know of nobody else who took physical action to  
4       punch Mr. McCurdy, correct?

5       A.   Correct.

6       Q.   Did you kick Mr. McCurdy?

7       A.   Absolutely not.

8       Q.   Mr. McCurdy was handcuffed at some point during this  
9       incident, correct?

10      A.   Yes.

11      Q.   What color were the handcuffs?

12      A.   I do not recall.

13      Q.   Does anybody in that facility use pink handcuffs?

14      A.   No.

15      Q.   Never saw Captain Bell use pink handcuffs?

16      A.   I've never seen it.

17      Q.   Never saw that in your life, in your career there.

18      A.   No, sir.

19      Q.   Have you seen other people handcuffed at AMKC since you  
20      worked there?

21      A.   Yes, I have.

22      Q.   Have you seen other people handcuffed in the presence of  
23      Captain Bell since you worked there?

24      A.   I don't recall.

25      Q.   Now the injuries you allege you sustained were right wrist



J941MCC1

Mitchell - Direct

1 swelling and right thumb swelling, correct?

2 A. Yes.

3 Q. Now you heard your attorney's opening, correct?

4 A. Yes.

5 Q. And he said in sum and substance you were injured by a  
6 punch to the face.

7 A. Correct.

8 Q. However, you gave a deposition in this case and you just  
9 testified in this case that your injuries were right wrist  
10 swelling and right thumb swelling, is that correct?

11 MR. SIDDIQI: Objection, your Honor. He's referring  
12 to the deposition. If we could get a --

13 THE COURT: Counsel, no speaking objections.

14 MR. SIDDIQI: Sorry, your Honor.

15 THE COURT: Thank you.

16 Counsel, can you please rephrase the question.

17 MR. LICHTMACHER: Sure.

18 BY MR. LICHTMACHER:

19 Q. Correct me if I'm wrong. Didn't you just testify that the  
20 injuries you sustained were right wrist swelling and right  
21 thumb swelling?

22 A. Yes.

23 Q. And did you have another injury?

24 A. Yes, I did.

25 Q. What was that injury?

J941MCC1

Mitchell - Direct

1 A. I had left facial swelling.

2 Q. Well, you gave a deposition in this case, correct?

3 A. Yes.

4 Q. And that deposition was conducted on May 30, 2018, in my  
5 office, correct?

6 A. I don't recall the date.

7 Q. Well, I'll show the deposition transcript to your attorney.  
8 Maybe they'll stipulate to it.

9 MR. LICHTMACHER: Counsel.

10 I believe they just stipulated. I believe they just  
11 stipulated that that deposition took place on May 30th of 2018.

12 Q. And that was in my office, correct?

13 A. Yes.

14 Q. Now in that deposition you raised your right hand and you  
15 swore to tell the truth, correct?

16 A. Yes.

17 Q. And you understood that you were sworn in under penalty of  
18 perjury, correct?

19 A. Yes.

20 Q. And you provided answers that you knew could be considered  
21 perjury if they were inaccurate, correct?

22 A. Yes.

23 Q. Did you give the following answer to the following  
24 questions on that date -- page 10, line 21, to page 11, line 2.

25 MR. LICHTMACHER: Your Honor, do you need a copy?

J941MCC1

Mitchell - Direct

1 THE COURT: I'm sorry, counsel. Do you have a copy of  
2 the document for the witness and the Court?

3 MR. LICHTMACHER: Yes, I do.

4 THE COURT: Thank you.

5 MR. LICHTMACHER: May I approach, your Honor.

6 THE COURT: You may.

7 Thank you. A copy of the document has been handed to  
8 the witness.

9 Counsel, you may proceed.

10 MR. LICHTMACHER: Thank you, your Honor.

11 BY MR. LICHTMACHER:

12 Q. Did you give the following answers to the following  
13 questions on that day -- page 10, line 21 to page 11, line 2:

14 "Actually, what part of your body --"

15 THE COURT: Sorry. Can you say "Question" where  
16 there's a question and then say "Answer" where there's an  
17 answer.

18 Q. "Q. Actually, what part of your body -- I phrased the  
19 question badly. My mistake.

20 "What injuries did you have that day?

21 "A. I had right wrist swelling and right thumb  
22 swelling."

23 Did you give that answer to that question?

24 A. Yes.

25 Q. You didn't make any mention of your face being injured in

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Mitchell - Direct

1 response to that question, did you?

2 A. No, I didn't.

3 Q. And in fact, you were provided with a copy -- or your  
4 attorney was provided with a copy of that deposition transcript  
5 with the understanding that you'd get an opportunity to make  
6 changes to the transcript if in fact it was in error, correct?

7 A. Yes.

8 Q. Did you change that?

9 A. No, I didn't change it. I didn't personally change it.

10 Q. So as you sit here today, was your face injured during this  
11 incident?

12 A. Yes.

13 Q. But you didn't say it in your deposition, did you?

14 MR. SIDDIQI: Objection, your Honor.

15 THE COURT: Thank you.

16 Can you please rephrase the question, counsel.

17 Q. Well, in your deposition, as I just read to you your  
18 questions and answers, you didn't indicate that in those  
19 questions and answers, did you?

20 MR. SIDDIQI: Objection, your Honor.

21 THE COURT: Thank you.

22 You can answer that question.

23 A. No, I didn't, but that was based on my immediate  
24 recollection of the events.

25 Q. So as you sit here today, you remember you had a facial

J941MCC1

Mitchell - Direct

1 injury, is that correct?

2 A. Yes.

3 Q. Is it fair to say that, well, May 30, 2018 was  
4 substantially closer to the event than we are today, in  
5 September of 2019?

6 A. Yes.

7 Q. And in fact, you generated other documents about your  
8 alleged injuries regarding this incident, correct?

9 A. Yes.

10 MR. LICHTMACHER: In fact, I'll show this to adversary  
11 counsel.

12 Q. You generated an employee claim regarding your alleged  
13 injuries, correct?

14 A. Yes.

15 Q. And in fact, that's a document that you generate in your  
16 regular course of business when you're alleging an injury and  
17 you work for DOCS, correct?

18 A. Yes.

19 Q. Now is it part of your job requirements that if you get an  
20 injury, to generate such a document?

21 A. Yes.

22 Q. And in fact, the employee claim that you generated, was it  
23 in fact generated with your handwriting?

24 And I will approach and hand it to you if that will be  
25 helpful.

J941MCC1

Mitchell - Direct

1 MR. LICHTMACHER: Your Honor, may I approach?

2 THE COURT: Yes.

3 A. Thank you.

4 Q. You're welcome.

5 Now I've handed you a document that's marked for  
6 identification as Plaintiff's 1. Please take a minute and look  
7 at the document.

8 Have you had a minute to peruse the document?

9 A. Yes.

10 Q. Now does this document have anybody's handwriting on it on  
11 both pages besides yours?

12 A. No.

13 Q. And this document was generated and signed by you, correct?

14 A. Correct.

15 MR. LICHTMACHER: Your Honor, I offer this into  
16 evidence as Plaintiff's Exhibit 1.

17 THE COURT: Thank you.

18 Counsel?

19 MR. SIDDIQI: We have an objection, your Honor. That  
20 document's incomplete.

21 THE COURT: Thank you. That's fine. Is there an  
22 additional -- why don't you come up.

23 (Continued on next page)

24

25

J941MCC1

Mitchell - Direct

1 (At the sidebar)

2 THE COURT: Thank you.

3 So I have the document, counsel. What's the issue?

4 MR. SIDDIQI: Your Honor, there's an additional page  
5 in the document that's not included in the exhibit. I'm  
6 handing it to the Court now. And that includes that Officer  
7 Mitchell stated at the time that he had a left facial injury.  
8 I believe that introduction of the document as is would be  
9 misleading to the jury.

10 MR. LICHTMACHER: Your Honor, the document clearly  
11 indicates it's page 1 of 2 and page 2 of 2. That other  
12 document was never indicated to me to be part of this document.  
13 If they want to try and do that, but it says page 1 of 2 and  
14 page 2 of 2. I don't know how much clearer it can be. I'm  
15 showing you the bottom of the document.

16 THE COURT: Thank you. I see that.

17 Counsel, why do you say that this is part of the same  
18 document? I note that the document that's been marked as  
19 Exhibit 1 is an employee claim; the other document that you've  
20 handed to me described as part of the same document describes  
21 itself as a limited release of health information.

22 MR. SIDDIQI: Your Honor, it's our position that these  
23 documents were submitted together as part of the employee claim  
24 by Officer Mitchell.

25 THE COURT: Thank you.

J941MCC1

Mitchell - Direct

1 I'll allow counsel to proceed. If you'd like to  
2 introduce this separately as another document that he  
3 introduced at the same time, you'll have an opportunity to do  
4 that on your redirect.

5 MR. SIDDIQI: Thank you, Judge.

6 MR. LICHTMACHER: Is the document in evidence?

7 THE COURT: I'll bring it in after we go back on the  
8 record.

9 MR. LICHTMACHER: Thank you.

10 (Continued on next page)



J941MCC1

Mitchell - Direct

1 (In open court)

2 THE COURT: Thank you very much, counsel. Objection  
3 overruled. I'm accepting Exhibit 1, Plaintiff's Exhibit 1,  
4 into evidence.

5 Counsel, you can proceed.

6 MR. LICHTMACHER: Thank you, your Honor.

7 (Plaintiff's Exhibit 1 received in evidence)

8 MR. LICHTMACHER: Let me turn this on.

9 May I show it to the jury, your Honor.

10 THE COURT: You may.

11 MR. LICHTMACHER: Would your Honor inquire if the jury  
12 can now see this document.

13 THE COURT: Thank you. It appears that they can.

14 MS. GOYKADOSH: Your Honor, we can't see it on our  
15 screens. I don't know why. I'm sorry.

16 MR. LICHTMACHER: I can't either.

17 MS. GOYKADOSH: Ah. Thank you.

18 THE COURT: Thank you. Proceed.

19 BY MR. LICHTMACHER:

20 Q. Now you're looking at the document that's been offered into  
21 evidence as Exhibit 1, correct?

22 A. Yes.

23 Q. I turn your attention to the bottom of the document. I'm  
24 going to point to it, right there. Do you see that? Will you  
25 read what that says.

J941MCC1

Mitchell - Direct

1 A. "Sprained wrist."

2 Q. No, no. I'm talking about underneath.

3 A. Underneath?

4 Q. Exactly -- a little over my finger.

5 A. Oh, okay.

6 Q. It says -- well, let me ask you, does that say page 1 of 2?

7 A. Yes.

8 Q. Let's turn to the next page.

9 A. Okay.

10 Q. Also at the bottom, does that say page 2 of 2?

11 A. Yes.

12 Q. So it's a two-page document, correct?

13 A. Correct.

14 Q. Now you submitted this claim, correct?

15 A. Yes.

16 Q. And the date that you submitted the claim was what?

17 A. The date that I wrote the claim was the next day, 2/20/15.

18 Q. And that's 5:16:13?

19 A. Say that again?

20 Q. Oh, I'm sorry. That was the date you got there. My  
21 mistake. Yeah. 2/20 of '15?

22 A. Correct.

23 Q. And where is that indicated; which page?

24 A. Would be on page 2 of 2.

25 Q. You submitted it the very next day, correct?

J941MCC1

Mitchell - Direct

1 A. Yes.

2 Q. Now the date that you submitted that, did you know whether  
3 or not Chance McCurdy had injuries?

4 A. No, I wasn't aware.

5 Q. Did you know whether or not Chance McCurdy had been taken  
6 to the clinic?

7 A. No, I wasn't aware.

8 Q. Do you know whether or not Chance McCurdy had been brought  
9 to Elmhurst Hospital at that point in time?

10 A. No, I wasn't aware.

11 Q. Now when an inmate suffers injuries and is brought to the  
12 clinic, does he just walk by himself?

13 A. No.

14 Q. Who takes him?

15 A. Officers.

16 (Continued on next page)

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J94Qmcc2

Mitchell - Direct

1 BY MR. LICHTMACHER: (Continued)

2 Q. Officers take him from the correctional facility, correct?

3 A. Correct.

4 Q. When an officer is taken to the hospital, who takes him  
5 there?

6 A. Other officers.

7 Q. And other officers from the correctional facility?

8 A. Correct.

9 Q. So people who work for the same people that you work for,  
10 correct?

11 A. Correct.

12 Q. OK. And let's look at the injury section of this,  
13 specifically on page 1, number 7. That's your handwriting,  
14 correct?

15 A. Correct.

16 Q. And can you please read what it says your injuries are?

17 A. Sprained wrist, swelling and pain in right index finger.

18 Q. See anything about your face being injured there?

19 A. No.

20 Q. Anything on page 2 about your face being injured?

21 A. No.

22 Q. And that's your signature there, correct?

23 A. Correct.

24 Q. And it's important you fill these forms out accurately and  
25 truthfully, isn't it, sir?

J94Qmcc2

Mitchell - Direct

1 A. Yes.

2 Q. And this is -- unlike today where we're five years after  
3 the incident, this is filled out by you, according to you, the  
4 next day, correct?

5 A. Correct.

6 Q. And on the next day you would have a pretty good memory of  
7 what happened to you that day, correct?

8 A. Yes.

9 Q. But you don't have anything on it about a facial injury on  
10 either of these two pages which are submitted as an employee  
11 claim, correct?

12 A. Correct.

13 Q. And that's a claim to the workers' compensation board,  
14 correct?

15 A. Yes.

16 Q. And the workers' compensation board is in a position to  
17 give you money, correct?

18 A. Correct.

19 Q. So you made a claim for money, and you didn't put down an  
20 injury that you allegedly had to your face. Is that correct?

21 A. Correct.

22 Q. In fact, you heard your attorney's opening. He talked  
23 about your facial injury, but that's not in there, is it?

24 A. No.

25 Q. Now, did you generate any other documents as part of your

J94Qmcc2

Mitchell - Direct

1 workers' comp. claim for money?

2 A. I don't recall.

3 MR. LICHTMACHER: Would you like to see it, Counsel?

4 May I approach the witness, your Honor?

5 THE COURT: You may.

6 Q. Now, is it fair to say you also generated a document called  
7 an employee statement with regard to workers' compensation  
8 claim initiation?

9 A. Yes.

10 Q. And on that document, does your handwriting -- you have it  
11 in front of you. Excuse me, your Honor.

12 You have in front of you, a document marked Exhibit 2  
13 for identification, correct?

14 A. Yes.

15 Q. Now, is that your employee statement to workers'  
16 compensation?

17 A. Yes.

18 Q. And is that a document that's generated in the regular  
19 course of business when it's necessary to do so?

20 A. Yes.

21 Q. And is part of your job as an employee when necessary to  
22 generate such a document if you're making a workers'  
23 compensation claim?

24 A. Yes.

25 Q. And is there handwriting on this page that belongs to

J94Qmcc2

Mitchell - Direct

1 anybody but you?

2 A. No.

3 MR. LICHTMACHER: Offer this into evidence as  
4 Plaintiff's Exhibit 2, your Honor.

5 THE COURT: Thank you.

6 Counsel?

7 MR. SIDDIQI: No objection, your Honor.

8 THE COURT: Thank you. I'm accepting Plaintiff's  
9 Exhibit 2 into evidence.

10 MR. LICHTMACHER: Publish it to the jury, your Honor?

11 THE COURT: Thank you. You may.

12 (Plaintiff's Exhibit 2 received in evidence)

13 Q. Now, in this statement which you generated, you indicate,  
14 if I may read from it and ask you if I'm reading your  
15 handwriting correctly, in the middle "While performing a search  
16 of an inmate, said inmate became physically assaultive by  
17 punching this writer in the facial area with a closed fist.  
18 This writer had no choice but to defend himself from attack."

19 You wrote that, correct?

20 A. Yes.

21 Q. Please take a look at the date at the bottom of this page.  
22 Does that say March 4, 2015?

23 A. Yes.

24 Q. In fact, this document was generated well after the other  
25 document was generated, correct, Plaintiff's 1?

J94Qmcc2

Mitchell - Direct

1 A. Yes.

2 Q. So suddenly on March 4 you had a punch to the face whereas  
3 directly after the incident on February 20 there was nothing  
4 about a punch to the face, and there was nothing about an  
5 injury to your face, was there?

6 A. Well, there was nothing about an injury to the face. The  
7 punch to the face there was nothing on that document entered as  
8 Plaintiff's Exhibit 1 that stated what happened -- like  
9 basically me saying me getting punched in the face.

10 Q. OK. You indicated your injuries, and you did not indicate  
11 that you had an injury to your face on Plaintiff's 1, did you?

12 A. No.

13 Q. And, in fact, that says page 1 of 2, and page 2 of 2 is a  
14 complete document, correct?

15 A. For Exhibit 1?

16 Q. Exhibit 1.

17 A. Yes, correct.

18 Q. All right. So now about two weeks later, suddenly you're  
19 talking about a punch to the face. And that's the first time  
20 that appears on part of the employee workers' comp. claim for  
21 money, correct?

22 A. Correct.

23 Q. And did you get the workers' comp.?

24 A. No, I didn't. I didn't receive anything -- any money from  
25 this.



J94Qmcc2

Mitchell - Direct

1 Q. So you applied for the money and you didn't get it,  
2 correct?

3 A. I didn't complete it, no.

4 Q. You didn't complete it. Did you get time off from work as  
5 a result of this punch to the face?

6 A. No, I didn't.

7 MR. LICHTMACHER: Removing that document.

8 Your Honor, was that accepted into evidence,  
9 Plaintiff's 2?

10 THE COURT: Yes, I accepted Plaintiff's Exhibit 2.

11 MR. LICHTMACHER: Sorry, your Honor.

12 THE COURT: It's all right.

13 Q. Now, had you been back to work after February 20 and before  
14 March 5?

15 A. Yes.

16 Q. Excuse me, before March 4, same question?

17 A. Yes.

18 Q. And when you went back to work, you went back to work at  
19 AMKC, correct?

20 A. Correct.

21 Q. And you got to talk to some of the same people you work  
22 with at AMKC at that time?

23 MR. SIDDIQI: Objection, your Honor.

24 THE COURT: Can you rephrase the question?

25 Q. Sure.

J94Qmcc2

Mitchell - Direct

1 Did you run into the same people you usually work with  
2 at AMKC at that time?

3 A. Correct.

4 Q. You did?

5 A. Correct.

6 Q. Was Captain Bell one of those people?

7 A. Yes.

8 Q. Did Captain Bell tell you to start indicating that you had  
9 been punched in the face?

10 A. No.

11 Q. Well, try to understand. Nothing about an injury to your  
12 face -- you were injured in your face, right?

13 A. Correct.

14 Q. You didn't indicate anything about it the day afterwards,  
15 and you first indicated it after you went back to work and  
16 after you might have run into Captain Bell, correct?

17 A. No.

18 Q. Did you run into Captain Bell after the incident?

19 A. Yes.

20 Q. Did you discuss the incident with her at all?

21 A. No.

22 Q. Now, Mr. McCurdy is a large man, isn't he?

23 A. Yes.

24 Q. He's about, I think, six-four -- everyone looks tall to me,  
25 but he looks to be about six-four to me.

J94Qmcc2

Mitchell - Direct

1 THE COURT: Thank you. Counsel, can you please  
2 inquire.

3 Q. Yes. Does he look to be about six-four to you?

4 A. About six-four.

5 Q. And he's strong looking at least?

6 A. Yes.

7 Q. And he punched you in the face, but you didn't mention that  
8 as an injury in your initial claim, correct?

9 A. Correct.

10 Q. Would you know if he's right-hand dominant, Mr. McCurdy?

11 A. I'm not aware of his dominant hand.

12 Q. Now, where in your face do you allege that Mr. McCurdy  
13 struck you?

14 A. My left side, my left eye.

15 Q. In the eye?

16 A. Fairly -- around the eye area.

17 Q. Around the eye area? OK.

18 Did Mr. McCurdy appear at all injured during this  
19 incident?

20 A. To my recollection, no.

21 Q. You didn't see any injuries, noticeable injuries on him?

22 A. No.

23 Q. And the punch or punches you threw, did they connect?

24 A. Yes.

25 Q. What parts of his body did they connect with?

J94Qmcc2

Mitchell - Direct

1 A. I don't recall.

2 Q. And did you hit him in the head, do you remember?

3 A. I don't recall.

4 Q. Do you remember if you used anything besides punches to hit  
5 him with?

6 A. No.

7 Q. You didn't kick him, did you?

8 A. Absolutely not.

9 Q. Were you wearing boots that day?

10 A. Yes.

11 Q. Is that standard fare, you wear boots to work when you go  
12 to work at AMKC?

13 A. Correct.

14 Q. What kind of boots are they?

15 A. Police military-style boots.

16 Q. They hard?

17 A. Yes.

18 Q. And have you ever kicked anybody with those boots?

19 A. Absolutely not.

20 Q. Because, in fact, kicking someone with those boots could  
21 inflict a lot of damage, couldn't they?

22 A. Correct.

23 Q. And you're not supposed to do that, are you?

24 A. No.

25 Q. In fact, it's not a recommended way to use force when

J94Qmcc2

Mitchell - Direct

1 necessary, is it?

2 A. Correct.

3 Q. Kicking someone, correct?

4 A. Yes, correct.

5 Q. Now, you say he hit you in the eye. Did that affect your  
6 vision in any way?

7 A. Yes.

8 Q. How did it affect your vision?

9 A. It blurred my vision.

10 Q. Now, did you report that on either of your -- either parts  
11 of the workers' comp. claim?

12 A. No, I didn't.

13 Q. Did you run to the eye doctor and say, hey, my vision is  
14 hurt?

15 A. I was seen in the clinic and followed by the hospital.

16 Q. And, in fact, nobody diagnosed you with any loss of vision,  
17 did they?

18 A. No.

19 Q. So you wouldn't have had a problem if -- well, withdrawn.

20 There came a point in time when Mr. McCurdy was  
21 handcuffed, correct?

22 A. Correct.

23 Q. And you were able to see him when he was handcuffed,  
24 correct?

25 A. No.

J94Qmcc2

Mitchell - Direct

1 Q. Why couldn't you see him?

2 A. My left eye was blurry, like I said.

3 Q. How about your right eye?

4 A. Yes.

5 Q. Was your right eye working?

6 A. Yes.

7 Q. And your left eye recovered pretty quickly, right?

8 A. Not really that quickly, but it recovered. It eventually  
9 recovered, yes.

10 Q. Well, you went back to work, right?

11 A. Correct.

12 Q. And you didn't put it on your workers' comp. form as we  
13 already covered?

14 A. I'm still on probation, sir, so I didn't want to miss any  
15 days of work.

16 Q. When you're on probation, if you get hurt, legitimately get  
17 hurt, not through your own fault, you could still claim an  
18 injury, correct?

19 A. Correct.

20 Q. And, again, nothing about vision problems appears on the  
21 two documents we looked at, does it?

22 A. Correct.

23 Q. And you didn't say anything happened to your right eye, did  
24 you?

25 A. No, I didn't.

J94Qmcc2

Mitchell - Direct

1 Q. So after Mr. McCurdy was handcuffed, was he anywhere near  
2 you?

3 A. No.

4 Q. So you were gone by the time he was handcuffed?

5 A. No. Once he was handcuffed and secured, I immediately left  
6 the area and went to go seek medical treatment.

7 Q. You didn't take him for medical treatment, did you?

8 A. No, I didn't.

9 Q. Because it's inappropriate if you're involved in the use of  
10 force to bring an inmate to the clinic, correct?

11 A. Correct, once the inmate is secured and the person that was  
12 involved in the use of force, we pretty much hand it over to  
13 somebody else.

14 Q. Well, you wanted to stay around to make sure, as you said,  
15 Mr. McCurdy was secured?

16 MR. SIDDIQI: Objection.

17 THE COURT: Can you rephrase the question?

18 Q. Sure.

19 Did you in fact stay on the scene until Mr. McCurdy  
20 was secured?

21 A. Yes.

22 Q. So at that time you would have been able to see him at  
23 least with your right eye, correct?

24 MR. SIDDIQI: Objection.

25 THE COURT: Thank you.

J94Qmcc2

Mitchell - Direct

1           You can answer the question?

2       A.   Yes.

3       Q.   And you didn't see any injuries on him, did you?

4       A.   No.

5       Q.   Did you become aware at any point in time that he had  
6       injuries?

7       A.   Repeat the question, please.

8       Q.   Did you report at any point in time that Mr. McCurdy had  
9       injuries?

10      A.   No.

11               MR. LICHTMACHER: Can I approach, your Honor?

12               THE COURT: You may.

13               MR. LICHTMACHER: Oh, to talk to the Judge, your  
14      Honor. I want a sidebar.

15               THE COURT: Thank you.

16               Yes, please come forward.

17               (Continued on next page)

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J94Qmcc2

Mitchell - Direct

1 (At the sidebar)

2 THE COURT: Go ahead, counsel.

3 MR. LICHTMACHER: I think I know the answer, but I  
4 don't want to overstep. You will not allow anything about the  
5 possibility of criminal charges being brought against  
6 Mr. McCurdy for what he did. Is that correct?

7 THE COURT: Thank you.

8 Counsel for defendants?

9 MR. SIDDIQI: Your Honor, I think that I believe that  
10 your ruling earlier today was clear that there is not to be any  
11 questioning with regards to whether there was a criminal  
12 prosecution, whether there could have been a criminal  
13 prosecution, especially considering the fact that this officer  
14 and Captain Bell don't have the authority to make a  
15 prosecutorial decision I think it would be very misleading to  
16 the jury, and I think the prejudicial effect would outweigh any  
17 probative value which would be minimal.

18 THE COURT: Thank you.

19 So, Counsel, my ruling was based on what I understood  
20 the anticipated questioning and, I'll call it, story line to  
21 be. I believe that that ruling was clear. Are you suggesting  
22 more limited inquiry now?

23 MR. LICHTMACHER: I would just -- based on the fact  
24 that he said he was temporarily blinded and he applied for  
25 workers' comp. after the incident from the injury, that denotes

J94Qmcc2

Mitchell - Direct

1 a serious injury. And if he had a serious injury there's a  
2 higher level of crime. And if there's a higher level of crime,  
3 I should at least be able to ask him was Mr. McCurdy to your  
4 knowledge criminally prosecuted for a crime regarding his  
5 allegedly punching you in the face -- in the eye that day. I'd  
6 like to ask him that, and I'd like to ask him if he's ever been  
7 involved in a criminal prosecution of an inmate, and if so,  
8 under those circumstances, did you have to sign a supporting  
9 deposition under penalty of perjury. There is additional  
10 information now which I think makes these questions viable.

11 THE COURT: Thank you.

12 And I think that both of those questions are covered  
13 by my prior ruling. I won't hypothesize other questions that  
14 would not fall within their scope, but both of those proposed  
15 questions would, and I would not permit those two particular  
16 questions given the scope of my prior ruling.

17 MR. LICHTMACHER: Note my objection for the record,  
18 your Honor.

19 THE COURT: Thank you. Understood.

20 (Continued on next page)

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J94Qmcc2

Mitchell - Direct

1 (In open court)

2 THE COURT: Thank you, Counsel. You can proceed.

3 MR. LICHTMACHER: Half a second, your Honor.

4 (Pause)

5 BY MR. LICHTMACHER:

6 Q. Now, did there come a time when Mr. McCurdy was taken to  
7 the ground?

8 A. Yes.

9 Q. And were you involved in taking him to the ground?

10 A. Yes.

11 Q. And at that point in time, had he already allegedly punched  
12 you?

13 A. Yes.

14 Q. And when you went to the ground, what part of your body hit  
15 the ground?

16 A. What part of my body?

17 Q. Yeah.

18 A. My arm, my -- my wrist, my arm, my shoulder, my knee.

19 Q. How about your -- well, those are all parts in front of  
20 your body, correct?

21 A. Correct.

22 Q. No part is in back of your body, correct?

23 A. Correct.

24 Q. That you just described, correct?

25 A. Correct.

J94Qmcc2

Mitchell - Cross

1 Q. So you must have gone facedown, correct?

2 A. Correct.

3 Q. And when you went facedown, did you bang your head?

4 A. No.

5 MR. LICHTMACHER: No more questions, your Honor.

6 THE COURT: Thank you.

7 Counsel for defendants.

8 MR. SIDDIQI: Thank you, your Honor.

9 CROSS-EXAMINATION

10 BY MR. SIDDIQI:

11 Q. Good morning, Officer Mitchell. How are you?

12 A. Good morning. I'm good.

13 Q. So, Officer Mitchell, you testified earlier that in  
14 February 2015, you had the rank of corrections officer. Is  
15 that correct?

16 A. Yes.

17 Q. What were your responsibilities as a correction officer?

18 A. The care, custody and control of inmates.

19 Q. And when you're on duty, do you wear any type of a utility  
20 belt?

21 A. Yes.

22 Q. What's on that belt?

23 A. Flashlight, handcuffs, OC chemical agent and pepper spray,  
24 pretty much.

25 Q. What is OC chemical agent?

J94Qmcc2

Mitchell - Cross

1 A. Pepper spray.

2 Q. Is there a distance at which you need to be for pepper  
3 spray to be effective?

4 A. Correct, approximately three feet.

5 Q. Do you ever carry a firearm?

6 A. Not while in a facility, but yes.

7 Q. So you carry a firearm outside the facility?

8 A. Correct.

9 Q. Is there a reason you do not carry a firearm inside the  
10 facility?

11 A. It could be taken away from --

12 MR. LICHTMACHER: Objection, your Honor.

13 THE COURT: Thank you. You can answer the question.

14 A. Because it could be we're outnumbered inside a facility  
15 with inmates, and it could be taken away from me and used  
16 against me.

17 Q. Officer Mitchell, what's the primary duty of a correction  
18 officer?

19 A. The care, custody and control of inmates.

20 Q. Officer Mitchell, did you have a specific area or  
21 assignment as a correction officer in February 2015?

22 A. Yes, secured, SRG officer.

23 Q. What does SRG stand for?

24 A. Security risk group.

25 Q. What is a security risk group?

J94Qmcc2

Mitchell - Cross

1 A. A gang.

2 Q. Is it part of your job to be aware of whether or not  
3 inmates are in gangs?

4 A. Yes.

5 Q. Why is that important?

6 MR. LICHTMACHER: Objection, your Honor.

7 THE COURT: Thank you. You can answer the question.

8 A. It's important for me to be aware because just to make sure  
9 all parties are involved when inmates are around, basically to  
10 make sure, keep the safety of all inmates and officers.

11 Q. Is there a special way in which inmates who have SRG  
12 statuses or are in gangs are housed?

13 A. Yes.

14 Q. Can you please describe what that special way is?

15 A. Generally, they're housed together with their same -- their  
16 same gang.

17 Q. Is there a reason that gangs are housed the same gang in  
18 one housing area?

19 A. Basically for the safety of themselves to basically prevent  
20 incidents of violence from happening.

21 Q. What was the housing area where Mr. McCurdy was during this  
22 incident?

23 A. Quad lower 14.

24 Q. And did quad lower 14 correspond to a particular gang?

25 A. Yes.

J94Qmcc2

Mitchell - Cross

1 Q. What gang was that?

2 A. Bloods.

3 Q. And what are the Bloods?

4 A. The Bloods are a violent street gang which operate also in  
5 jail and outside.

6 Q. Is the Bloods one thing or are there subsets?

7 MR. LICHTMACHER: Objection, your Honor.

8 THE COURT: Thank you. Counsel, please come forward.

9 MR. SIDDIQI: Yes, your Honor.

10 (Continued on next page)

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J94Qmcc2

Mitchell - Cross

1 (At the sidebar)

2 THE COURT: So, Counsel, there's an objection?

3 MR. LICHTMACHER: Yes, your Honor. I wasn't aware  
4 that this witness was going to be asked -- testify as an expert  
5 about the Bloods. I understand about the housing areas.  
6 That's one thing. I understand about the classifications. But  
7 for him to start opining about, you know, basically the  
8 construction of the Bloods, how they're put together and how  
9 they operate, that's well beyond his scope, and I have no  
10 expert report on that.

11 THE COURT: Thank you.

12 Counsel, what's the pertinence of this line of inquiry  
13 regarding the particular structure of the Bloods? Counsel?

14 MR. SIDDIQI: Your Honor, it's our understanding that  
15 plaintiff is eventually going to testify that his so-called  
16 beating was retaliation because he was not helping the officers  
17 to enforce rules and regulations within the housing area and  
18 that he would have been positioned to do so as a high-ranking  
19 member of the Bloods.

20 THE COURT: I understand, which is why I understand  
21 that the testimony regarding the Bloods is coming in. The  
22 particular request by counsel for plaintiff is why is it this  
23 witness is testifying about, I'll call it, the specific makeup  
24 or sets of the Bloods, which I understand to be the subject of  
25 this question.



J94Qmcc2

Mitchell - Cross

1 MR. SIDDIQI: Your Honor, there are two reasons. One  
2 is that the testimony that will be elicited is going to show  
3 that different sets have different levels of power within the  
4 housing areas. And, number two, plaintiff is going to  
5 testify -- at least he testified in his deposition as to how  
6 large the Bloods are, that there are divisions of the Bloods,  
7 and that it's a large organization. To the extent that  
8 plaintiff is going to put on that testimony, we think that we  
9 should be allowed to explore the structure of the Bloods as it  
10 exists within Rikers Island.

11 THE COURT: Thank you.

12 What's the basis for this witness's knowledge  
13 regarding those issues? I understand plaintiff was a member of  
14 the Bloods. What's this witness's basis for knowledge  
15 regarding this issue?

16 MR. SIDDIQI: Your Honor, I can elicit more testimony,  
17 but as an SRG officer, these officers who are SRG officers are  
18 given additional training in identifying gang markings and  
19 identifying subsets of the gangs, and they need to know this in  
20 order to effectively do their jobs in policing the inmates.

21 THE COURT: Thank you.

22 So this is based on his personal observation?

23 MR. SIDDIQI: His personal observation and experience  
24 at Rikers Island.

25 THE COURT: Thank you.

J94Qmcc2

Mitchell - Cross

1 Counsel for plaintiff?

2 MR. LICHTMACHER: He's still seeking to testify as an  
3 expert, your Honor. It's inappropriate. He's still seeking to  
4 do that. In fact, they just acknowledged they can get this  
5 information out of my client. I don't see why they have to do  
6 it with an officer who would have no inside knowledge of this  
7 in any way. So, you know, I got no expert report from him. I  
8 was not told of anything like this, and now suddenly it's being  
9 brought into trial. It's unfair.

10 THE COURT: Thank you.

11 Counsel, you understand the objection; namely, that  
12 you're having this lay witness testify, according to plaintiff,  
13 about areas of which he has perhaps limited personal knowledge,  
14 but largely based on, I'll call it, education and things that  
15 he has learned; in other words, arguably as an expert regarding  
16 policing and gang characteristics in the absence of a report.  
17 Why is this proper?

18 MR. SIDDIQI: Your Honor, I understand that, you know,  
19 at first blush it may seem like this is an expert area, but I  
20 think that the testimony that is going to come out is going to  
21 be clear that these officers even sometimes have to separate  
22 people who are within the Bloods gang itself.

23 So there are, for example, there's a set called Mac  
24 Baller Brims, and there's another set called Gorilla Stone.  
25 It's my understanding that these two sets within the Bloods

J94Qmcc2

Mitchell - Cross

1 sometimes fight with each other and cause violence against each  
2 other. An SRG officer has to know that inmates of these sets  
3 have to be separated and kept away from each other in order to  
4 maintain the security in the facility.

5 THE COURT: What's the pertinence of this?

6 MR. SIDDIQI: Your Honor, the plaintiff testified that  
7 the slashing at issue was an internal Bloods matter, and that  
8 it was a dispute within the gang.

9 Furthermore, if plaintiff is going to testify that he  
10 was some sort of an influential member of the Bloods gang, I  
11 think it's pertinent if we're going to later impeach plaintiff  
12 on his testimony to show that he was either a member of  
13 lower-ranking set or that he is not actually competent to  
14 testify as to the dynamics of the Blood gang on Rikers Island.

15 THE COURT: I'm sorry, plaintiff is not competent but  
16 this witness is?

17 MR. SIDDIQI: Your Honor, it's our testimony that  
18 plaintiff -- it's going to be our argument that plaintiff is,  
19 through a mixture of bravado and exaggeration, exaggerating his  
20 position within the gang so that he can state that the officers  
21 needed to use him to enforce their policies on Rikers.

22 THE COURT: Thank you.

23 I'm sustaining the objection to this question  
24 regarding the, I'll call it, structure of the Bloods gang  
25 generally.

J94Qmcc2

Mitchell - Cross

1 First, I'm concerned about, I'll call it, the  
2 foundation -- lack of foundation for the witness's knowledge  
3 regarding this issue, at least as it's been established on the  
4 record at this point. That's the principal basis for my  
5 ruling.

6 Thank you.

7 (Continued on next page)

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J94Qmcc2

Mitchell - Cross

1 (In open court)

2 THE COURT: Thank you.

3 Counsel, you can proceed.

4 MR. SIDDIQI: Thank you, your Honor.

5 BY MR. SIDDIQI:

6 Q. Officer Mitchell, did there come a point in time where  
7 there was an emergency situation at AMKC or the Anna M. Kross  
8 Center on February 19, 2015?

9 A. Yes.

10 Q. What was that emergency?

11 A. There was a slashing in the commissary.

12 Q. What is the commissary?

13 A. Commissary is an area where inmates go buy food, toiletries  
14 and snacks, things like that.

15 Q. Can you explain what you mean further by "slashing"?

16 A. Basically there was an inmate-on-inmate altercation and an  
17 instrument was used, a sharp instrument was used, to cut  
18 another inmate.

19 Q. Officer Mitchell, based on your experience, do you know how  
20 a sharpened instrument would make its way into Rikers?

21 A. Usually, they're fashioned. You know, they'll make them  
22 themselves or they could basically come in through the visits  
23 areas or they could come in through other packages and things  
24 like that.

25 Q. Officer Mitchell, after an inmate-on-inmate slashing, what

J94Qmcc2

Mitchell - Cross

1 steps do you take as a corrections officer?

2 A. As a corrections officer, we separate all parties involved  
3 and people in the vicinity, and basically they're separated and  
4 secured, and we escort them to an area to be strip-searched.

5 Q. Is that what you did on February 19, 2015?

6 A. Yes.

7 Q. Where did you take the inmates to be searched?

8 A. To the housing area.

9 Q. And what's the purpose of this search after an  
10 inmate-on-inmate slashing?

11 A. To recover the item used and basically to recover any  
12 additional contraband or weapons.

13 Q. Did there come a point in time on February 19, 2015 that  
14 you noticed Chance McCurdy?

15 A. Yes.

16 Q. How did you notice him?

17 A. I was assigned to strip-search him.

18 Q. How was he behaving?

19 MR. LICHTMACHER: Objection.

20 THE COURT: Thank you.

21 You can answer the question.

22 A. He seemed very irate, kind of -- kind of agitated.

23 Q. And did his behavior lead you to any conclusion with  
24 regards to why he was acting that way?

25 MR. LICHTMACHER: Objection, your Honor.

J94Qmcc2

Mitchell - Cross

1 THE COURT: Thank you. Sustained.

2 Can you please rephrase the question?

3 BY MR. SIDDIQI:

4 Q. Did you come to any conclusion based on plaintiff's  
5 behavior?

6 MR. LICHTMACHER: Objection, your Honor.

7 THE COURT: Thank you.

8 You can answer the question.

9 A. Yes.

10 Q. And what was that conclusion?

11 A. That he was possibly in possession of contraband.

12 Q. Are you aware of the plaintiff's SRG status?

13 A. Yes.

14 Q. And what's that?

15 A. Blood.

16 Q. Are you aware of the substance of the crime for which  
17 plaintiff was previously convicted?

18 MR. LICHTMACHER: Objection, your Honor.

19 THE COURT: Thank you.

20 Counsel, you can ask the question. Please proceed.

21 MR. SIDDIQI: Your Honor, may I have a sidebar?

22 THE COURT: Thank you. Yes you may.

23 (Continued on next page)

J94Qmcc2

Mitchell - Cross

1 (At the side bar)

2 THE COURT: Thank you.

3 So, Counsel, why are you asking this witness this  
4 question? What's purpose of it, and why does it come in?

5 MR. SIDDIQI: Your Honor, as an initial matter --  
6 well, actually, sorry, let me answer your question.

7 I'm trying to elicit testimony as to the fact that  
8 plaintiff has been convicted of being a sexual offender, this  
9 is to later deal with plaintiff's testimony that he was a  
10 high-ranking member of the Bloods. The officer will testify  
11 that based on his experience, inmates who are convicted of  
12 sexual offenses are not respected by other inmates, and,  
13 furthermore, that inmates who are convicted of sexual offenses  
14 are not respected within the Bloods gang.

15 THE COURT: Thank you.

16 Counsel?

17 MR. LICHTMACHER: Your Honor, it's a little convoluted  
18 the way he's going about it. Certainly with Mr. McCurdy, he  
19 can ask about his convictions as they already noted they want  
20 to and get them in that way.

21 So, through this witness it would be hearsay, number  
22 one, for it to come in, so -- and that alone should preclude  
23 it. This witness, they seem to be trying to expand the scope  
24 of what he is here and should be here to testify about. He's  
25 not an expert. And he's not an expert on McCurdy's criminal



J94Qmcc2

Mitchell - Cross

1 record. You know, I don't see how this can possibly come in  
2 through this person.

3 THE COURT: Thank you.

4 Counsel, any further argument?

5 MR. SIDDIQI: Your Honor, the officer has testified  
6 that he is an SRG officer. The officer has testified that he  
7 is charged with dealing with inmates with SRG statuses. I  
8 think that if Mr. McCurdy is going to forward a theory that  
9 this alleged assault was caused because the officers were angry  
10 at him for not enforcing their rules --

11 THE COURT: Counsel, that's not the question. The  
12 question is, why does this -- why can this witness testify what  
13 Mr. McCurdy's criminal record is? Counsel has argued that that  
14 is hearsay. This is a separate question from whether or not he  
15 can testify that he was understood to be a sex offender to deal  
16 with the narrative.

17 The question is why he can answer this specific  
18 question; namely, what is Mr. McCurdy's criminal record? Why  
19 can this security officer answer that particular question?

20 MR. SIDDIQI: Your Honor, would it be appropriate if  
21 the question was changed to: Are you aware Mr. McCurdy is  
22 convicted of a sexual offense?

23 THE COURT: Thank you. What's the context?

24 MR. SIDDIQI: Again -- if I can have a moment?

25 (Pause)

J94Qmcc2

Mitchell - Cross

1 MR. SIDDIQI: Your Honor, I'll withdraw the question.

2 THE COURT: Thank you.

3 (Continued on next page)

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J94Qmcc2

Mitchell - Cross

1 (In open court)

2 THE COURT: Thank you. Counsel, you can proceed.

3 MR. SIDDIQI: Yes, your Honor.

4 BY MR. SIDDIQI:

5 Q. Officer Mitchell, have you conducted strip searches in the  
6 past?

7 A. Yes.

8 Q. Have you ever found contraband on or inside an inmate as a  
9 result of a strip-search?

10 A. Yes.

11 Q. What contraband have you found in the past?

12 MR. LICHTMACHER: Objection, your Honor.

13 THE COURT: Thank you.

14 You can answer the question.

15 A. Scalpels, razors, drugs, things like that.

16 Q. On February 19, 2015, did you ask the plaintiff to comply  
17 with a strip-search?

18 A. Yes.

19 Q. And do you know what words you said to tell him to do that?

20 A. Yes. I told him basically we're just going to conduct --  
21 I'm going to conduct a strip-search; to hand me one item of  
22 clothing at a time, to not shake or throw anything.

23 Q. Why do you give those instructions?

24 A. In case there's contraband secreted inside the shirt or,  
25 you know, in the lining of the shirt or the clothing.

J94Qmcc2

Mitchell - Cross

1 Q. Did Mr. McCurdy say anything in response to you?

2 A. He said, "Fuck y'all. It's lit."

3 Q. And what does "it's lit" mean?

4 MR. LICHTMACHER: Objection.

5 THE COURT: Thank you.

6 Can you please rephrase the question?

7 Q. Did you understand what he meant when he said "it's lit"?

8 A. Yes.

9 Q. What did you understand him to mean?

10 A. Be prepared for an altercation.

11 Q. What did you do after he used those words?

12 A. I tried to gain compliance. I told him basically like  
13 let's complete the search. It's one, two, three, we'll be in  
14 and out. Let's complete the search. Just to hand me his  
15 shirt, one item of clothing at a time.

16 Q. Did the plaintiff in fact comply?

17 A. No.

18 Q. Did he do something else?

19 A. Yes.

20 Q. What did he do?

21 A. He began to remove his shirt. He removed his shirt and  
22 immediately threw it at me.

23 Q. And did he say anything to you at the time he threw his  
24 shirt?

25 A. Yes.

J94Qmcc2

Mitchell - Cross

1 Q. Do you remember what he said?

2 A. He said, "Fuck y'all. It's lit. I'm gonna cut one of  
3 y'all."

4 Q. And did you understand what he meant when he said, "I'm  
5 going to cut one of you"?

6 A. Yes.

7 Q. What did you understand that to mean?

8 A. That he was going to use an instrument to cut me.

9 Q. And what did Mr. McCurdy do, if anything, after he threw  
10 the T-shirt at you?

11 A. He immediately punched me in the face.

12 Q. Did that punch land?

13 A. Yes.

14 Q. What part of your face did it land on?

15 A. My left eye.

16 Q. How close were you to Mr. McCurdy at the time that he  
17 punched you?

18 A. I don't recall. I was close, pretty close.

19 Q. Do you recall the strength of the punch?

20 A. It was fairly strong.

21 Q. What did you feel after being punched by the plaintiff?

22 A. I immediately felt a sharp pain in my eye, like a sharp  
23 pain in my eye, and my eye started bruising and swelling and  
24 tearing.

25 Q. Could you see?

J94Qmcc2

Mitchell - Cross

1 A. Not out of my left eye, no.

2 Q. And did you do anything in response to being punched by the  
3 plaintiff?

4 A. I immediately went in reflex, I threw a punch back.

5 Q. Is there a reason you did not use your chemical agent?

6 A. I was too close, and I felt like it wouldn't have been as  
7 effective.

8 Q. Do you know how many times you punched the plaintiff?

9 A. I don't recall.

10 Q. Could you just speak up? I couldn't hear what you said.

11 A. I do not recall.

12 Q. Is there a reason you cannot recall?

13 A. I was in the heat of the moment, and in the heat of the  
14 moment I really don't recall how many times.

15 Q. After you punched the plaintiff, did he then comply and  
16 stop fighting you?

17 A. No.

18 Q. What did he do next?

19 A. He continued to resist. He continued to basically look  
20 like he was going to throw another punch.

21 Q. Did any officer come to assist you?

22 A. Yes.

23 Q. Who was that officer?

24 A. Officer Cutler.

25 Q. Did the struggle continue?

J94Qmcc2

Mitchell - Cross

1 A. Yes.

2 MR. SIDDIQI: Just one moment, your Honor.

3 (Pause)

4 Q. Officer Mitchell, I'm going to show you a series of  
5 photographs. Officer Mitchell, are you familiar with quad 14 A  
6 lower at the AMKC?

7 A. Yes.

8 Q. How are you familiar with that area?

9 A. I worked in the housing area a couple times.

10 Q. Is this photograph that's been marked for identification as  
11 C, is that a fair representation of what tier 14 A lower looked  
12 like on February 19, 2015?

13 A. Yes.

14 MR. SIDDIQI: Your Honor, I would like to show this  
15 photograph to the jury for demonstrative purposes?

16 MR. LICHTMACHER: Voir dire.

17 THE COURT: Thank you. Please proceed.

18 VOIR DIRE EXAMINATION

19 BY MR. LICHTMACHER:

20 Q. Now, I think you testified that the whole time you've been  
21 at DOCS, you've been at AMKC, correct?

22 A. Correct.

23 Q. And you haven't spent time working at the other facilities,  
24 correct?

25 A. Repeat the question?

J94Qmcc2

Mitchell - Cross

1 Q. You haven't spent time working at other facilities --  
2 withdrawn.

3 Rikers Island has several facilities, correct?

4 A. Correct.

5 Q. How many is it now, something like 16?

6 A. I don't know the exact number.

7 Q. Neither do I. All right.

8 So, but there are numerous facilities on Rikers.  
9 You're aware of that?

10 A. Correct.

11 Q. And you haven't worked in the other ones, correct?

12 A. Correct.

13 Q. And, in fact, the one that you're most familiar with is  
14 AMKC, correct?

15 A. Correct.

16 Q. So you don't really know if the other facilities look like  
17 this as well, do you?

18 A. To the best of my knowledge, no.

19 Q. And have you -- did you take these photos?

20 A. No, I didn't.

21 MR. LICHTMACHER: At least the first one -- has he got  
22 all of them in front of him or just that one?

23 MR. SIDDIQI: Just this one.

24 Q. Just that one. You didn't take this photo. Were you  
25 present when it was being taken?



J94Qmcc2

Mitchell - Cross

1 A. Yes.

2 Q. You were there with it, and this is a fair and accurate  
3 representation of the way it looked on the day this photo was  
4 taken?

5 A. Yes.

6 Q. When was the photo taken?

7 A. I don't recall the date.

8 Q. Well, was it in 2015?

9 A. No.

10 Q. Was it in 2016?

11 A. No.

12 Q. Was it in 2017?

13 A. No.

14 Q. Was it in 2018?

15 A. No.

16 Q. So, I gather, it was either taken before the incident or it  
17 was taken this year, correct?

18 A. Correct.

19 Q. So, do you remember what, if any, changes were made in that  
20 time period or if -- withdrawn.

21 Do you remember if any changes were made in that  
22 facility during that time period?

23 A. To the best of my knowledge, the most they do is just  
24 repaint.

25 Q. Repaint. So this doesn't look exactly the way it did in

J94Qmcc2

Mitchell - Cross

1 2015, does it?

2 A. Minus the color? No.

3 Q. Minus the color?

4 A. It looks exactly the same minus the color.

5 Q. Minus the color, it looks exactly the same?

6 MR. LICHTMACHER: Your Honor, I object to the exhibit  
7 coming in. I object because he can't -- well, withdrawn.

8 Q. Do you know whether or not this exhibit could be from one  
9 of the other facilities?

10 A. That's for sure at AMKC.

11 Q. You know it's AMKC?

12 A. Correct.

13 Q. But you don't know what the other facilities look like?

14 A. I'm aware of what my facility looks like, yes.

15 Q. Right, you're aware of --

16 MR. LICHTMACHER: Your Honor, I still object to the  
17 document coming in on two grounds.

18 THE COURT: Counsel, please come forward. No speaking  
19 objections.

20 (Continued on next page)

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J94Qmcc2

Mitchell - Cross

1 (At the side bar)

2 THE COURT: Thank you.

3 Let me just reiterate my statements to the parties at  
4 our final pretrial conference and my reminder to counsel for  
5 defendants earlier. No speaking objections. State the  
6 objection and the basis for it briefly. If you'd like to  
7 discuss something in more depth, you should do it at sidebar  
8 and not through a demonstration in front of the jury.

9 MR. LICHTMACHER: OK.

10 THE COURT: Thank you.

11 So what's the nature of the issue, understanding that  
12 this is not being brought in to evidence, but that counsel  
13 wants to bring it in as a demonstrative to show generally what  
14 the hallway looks like.

15 My understanding was that the parties had conferred on  
16 this topic, as I invited them to. I invited you to let me know  
17 in your August 29 letter the concerns regarding these.

18 With that introduction, Counsel, what's the concern?

19 MR. LICHTMACHER: Well, we did discuss, I think at the  
20 conference, but these weren't produced to me until well after  
21 discovery ended on the eve of trial. So I've had no discovery.  
22 The closest I had discovery on this is what I just asked him  
23 right now. So I haven't had a chance to explore these. I  
24 haven't had a chance to really go over them to ask questions  
25 about them.

J94Qmcc2

Mitchell - Cross

1           So it is prejudicial to my client. They should have  
2           been produced in time. They had access to the facility the  
3           whole time. They represent DOCS. So I don't know why suddenly  
4           they're able to be used right at the eve of our trial when they  
5           were produced on the eve of trial.

6           THE COURT: Thank you. That's a legitimate concern.

7           Again, let me remind you that the context here, which  
8           is that this issue was raised previously, that the Court  
9           invited the parties to provide comments regarding their use in  
10          a joint letter on August 29. No comments were made at that  
11          time. We discussed these demonstratives earlier. Now during  
12          the trial, rather than at any of those prior points, this issue  
13          has been raised despite the Court's invitation to the parties  
14          to provide the Court with any information about potential  
15          objections at any of those prior dates or in those prior  
16          formats which would not require us to waste the jury's time.

17          But having again set forth that context for some  
18          anticipated objection, counsel for defendants, what's your  
19          position?

20          MS. GOYKADOSH: If I may, your Honor?

21          THE COURT: Yes.

22          MS. GOYKADOSH: These exhibits are only being used for  
23          demonstrative purposes. I was not the one who conducted  
24          discovery in this case. However, these exhibits were not  
25          provided to Mr. Lichtmacher until last week. We agree with

J94Qmcc2

Mitchell - Cross

1 that. However, again, they're only being used for  
2 demonstrative purposes. They're an aid for the jury to  
3 understand what the cell looked like, what the hallway looked  
4 like. These are locations that we're going to be talking about  
5 in this case. Mr. Lichtmacher did conduct discovery in this  
6 case, and he certainly could have asked for any photos at that  
7 time if he wanted them, but that's not the point. The point is  
8 we're here now, we want to use these for demonstratives as an  
9 aid to help the jury understand. And demonstratives I don't  
10 believe need to be produced during discovery. It's an aid for  
11 the jury.

12 THE COURT: Thank you. So let me -- please, go ahead,  
13 Counsel.

14 MR. LICHTMACHER: One thing. In my experience through  
15 civil rights, which I guess I can say at this point is fairly  
16 extensive, prison photos are almost never given to plaintiff's  
17 attorneys for safety concerns, you know, knowing too much about  
18 the prison, the way it's laid out. So I've jumped through  
19 great hoops in one case to get them Upstate, and usually  
20 they're just routinely denied.

21 So under these circumstances, again, them having  
22 access to it, you are correct, I should have raised this more  
23 stringently, but I did raise it during the conference that we  
24 did have. You are correct about that though, your Honor.

25 THE COURT: Thank you.

J94Qmcc2

Mitchell - Cross

1           What's the prejudice here, Counsel?

2           MR. LICHTMACHER: You know, I haven't had the  
3 opportunity to really -- particularly in light of the problems  
4 with bringing in my client, had the opportunity to go over it  
5 with him. I have no idea what the nature of these are.  
6 Excuse me, that's not true. What they're being used for.  
7 Sorry, I misspoke. What they're being used for, and, you know,  
8 trial by surprise is not really -- and it is surprise, because  
9 the purpose of them is surprise at this point. You know, in  
10 this type of instance, you know, I'm given no preparation about  
11 what's going to be said about them, you know, is this the way  
12 the prison look?

13           THE COURT: I will permit you to use them. I will  
14 address the basis for the decision during a break. I just  
15 don't want to, again, use up too much of the jury's time.

16           MR. LICHTMACHER: Sorry.

17           THE COURT: The demonstratives were identified by  
18 counsel for defendants previously. There was a prior  
19 opportunity for counsel for plaintiff to review them and to  
20 comment on them. I don't believe that it's a surprise as a  
21 result. I don't understand there to be appreciable prejudice.  
22 These are images of the location at issue. They have great  
23 value as a result to help the jury understand the setting where  
24 the incident occurred.

25           The parties will have the opportunity to explore any

J94Qmcc2

Mitchell - Cross

1 distinctions between these images and the site as it existed at  
2 the time of the events at issue during examination. But again,  
3 these are being used as demonstratives, not as being introduced  
4 as direct evidence. But I will, of course, give the parties  
5 the opportunity to query the witnesses about these images to  
6 identify the distinctions between them and the situation at the  
7 time of the incident at issue here.

8 MR. LICHTMACHER: Your Honor, I believe if the  
9 entirety of testimony is going to be what happened inside the  
10 cell, why are we getting pictures of the hallway? How does it  
11 assist the jury in any way?

12 THE COURT: Thank you. Understood.

13 We'll hear about that. There are also images of the  
14 hall. Again, however, this is a waste of the jury's time,  
15 Counsel, which is why I tried very hard to encourage the  
16 parties to discuss this issue when it was first raised a week  
17 ago and to submit written objections to the Court. Having  
18 failed to receive them, I am dealing with this on the fly.

19 MR. SIDDIQI: Your Honor, so as to not to waste the  
20 jury's time, can I just not have to go through each of these  
21 photographs now and show them one at a time, or do we have to  
22 do this exercise for each photograph?

23 THE COURT: You need to do the exercise for each  
24 photograph.

25 MR. SIDDIQI: OK. Thank you, your Honor.

J94Qmcc2

Mitchell - Cross

(Continued on next page)



J94Qmcc2

Mitchell - Cross

1 (In open court)

2 THE COURT: Thank you. Counsel, you can proceed.

3 BY MR. SIDDIQI:

4 Q. Officer Mitchell, looking at what's been marked as Exhibit  
5 C again, do you recognize what this is a photograph of?

6 A. Yes.

7 Q. And you're familiar with this area?

8 A. Yes.

9 Q. And why are you familiar with this area?

10 A. I've worked there before.

11 MR. SIDDIQI: Your Honor, I'd like to show this  
12 photograph to the jury for demonstrative purposes.

13 THE COURT: Thank you. You can proceed.

14 Q. So, Officer Mitchell, what's this a photograph of?

15 A. Quad lower 14 housing area.

16 Q. Officer Mitchell, what are these doors that have numbers  
17 above them?

18 A. Cells.

19 Q. Officer Mitchell, I'm now showing you what's been marked as  
20 Defendant's E for identification. Do you recognize this  
21 photograph?

22 A. Yes.

23 Q. What do you recognize this photograph to be?

24 A. Quad 14 lower housing area.

25 Q. Are you familiar with this housing area?

J94Qmcc2

Mitchell - Cross

1 A. Yes.

2 Q. Is this a fair representation of what the housing area  
3 looked like on February 19, 2015?

4 A. Yes.

5 MR. SIDDIQI: Your Honor, I'd like to show this  
6 photograph to the jury for demonstrative purposes.

7 THE COURT: Thank you.

8 Counsel?

9 MR. LICHTMACHER: No objection.

10 THE COURT: Thank you. You can proceed.

11 Q. Officer Mitchell, this gate over here, what's it looking  
12 into?

13 A. It's looking into the housing area, the tier area.

14 Q. And the open door in the back, what's that?

15 A. An emergency exit.

16 Q. So is it fair to say that from this gate up till the door  
17 in the back that's the length of the housing area?

18 A. Correct.

19 Q. Thank you.

20 Officer Mitchell, I'm now showing you what's been  
21 marked as Defendant's F for identification, F as in Frank. Do  
22 you recognize what this is a photograph of?

23 A. Yes.

24 Q. What do you recognize it as a photograph of?

25 A. Inmate cell on quad lower 14.

J94Qmcc2

Mitchell - Cross

1 Q. Are you familiar with inmates cells on quad lower 14?

2 A. Yes.

3 Q. How are you familiar with them?

4 A. Again, I've worked the area. I'm familiar with the area.

5 Q. Is this a fair representation of what the cells looked like  
6 on February 19, 2015?

7 A. Yes.

8 MR. SIDDIQI: Your Honor, I'd like to show this  
9 photograph to the jury for demonstrative purposes.

10 MR. LICHTMACHER: No objection.

11 THE COURT: Thank you. You can proceed.

12 BY MR. SIDDIQI:

13 Q. Officer Mitchell, so what are we looking at in this  
14 picture?

15 A. A bed frame.

16 Q. And this doorway, what's it the doorway to?

17 A. A doorway to a cell.

18 Q. And this closed doorway, is it the doorway to a different  
19 cell?

20 A. Yes.

21 Q. Does this fairly depict the front of the area where you  
22 would have been searching Mr. McCurdy on February 29, 2015?

23 A. Yes.

24 Q. You may take that off.

25 Officer Mitchell, I'm now showing you what's been

J94Qmcc2

Mitchell - Cross

1 marked as Defendant's Exhibit G. Are you familiar with what's  
2 being depicted in this photograph?

3 A. Yes.

4 Q. Why are you familiar with what's being depicted in this  
5 photograph?

6 A. Again, I've seen the inside of a cell.

7 Q. Is this what plaintiff's cell looked like on February 19,  
8 2015?

9 A. Yes.

10 MR. SIDDIQI: Your Honor, I'd like to show this  
11 photograph to the jury for demonstrative purposes.

12 MR. LICHTMACHER: No objection, your Honor.

13 THE COURT: Thank you. You can proceed.

14 BY MR. SIDDIQI:

15 Q. Officer Mitchell, is this the view inside the cell from the  
16 door?

17 A. Correct.

18 Q. Can you please describe the furniture that we can see in  
19 this photograph?

20 A. A bed frame, toilet bowl and a sink.

21 Q. Officer Mitchell, is that bed frame fixed to the floor or  
22 the wall?

23 MR. LICHTMACHER: Objection. Leading.

24 THE COURT: Thank you. Counsel, I'll permit it.

25 You can answer the question.

J94Qmcc2

Mitchell - Cross

1 A. Yes, it's actually bolted into the floor and into the wall.

2 Q. And what material is this bed made out of?

3 A. Metal.

4 Q. What material is this toilet made out of?

5 A. Metal.

6 Q. And what material is the sink made out of?

7 A. Porcelain and metal.

8 Q. And the floor is it a hard or soft floor?

9 A. A hard floor.

10 Q. Thank you. You can take that off.

11 Officer Mitchell, I'm now showing you what's been  
12 marked as Defendant's Exhibit H for identification. Are you  
13 familiar with what's depicted in this photograph?

14 A. Yes.

15 Q. And what do you understand it to be?

16 A. The inside of a cell.

17 Q. How are you familiar with this area?

18 A. I've been inside of a cell.

19 Q. Is this a fair depiction of what the interior of the  
20 plaintiff's cell looked like on February 19, 2015?

21 A. Yes.

22 MR. SIDDIQI: Your Honor, I'd like to show this to the  
23 jury for demonstrative purposes.

24 MR. LICHTMACHER: No objection.

25 THE COURT: Thank you. Please proceed.

J94Qmcc2

Mitchell - Cross

1 Q. Officer Mitchell, is this another view of the same cell?

2 A. Yes.

3 Q. Officer Mitchell, you can point to the picture, and I think  
4 it will show up, or am I wrong? Officer Mitchell, where were  
5 you standing when you asked Mr. McCurdy to remove his clothes?

6 A. Inside the doorway of the cell.

7 Q. Over here?

8 A. Yes.

9 Q. Where was --

10 THE COURT: To be clear, counsel has indicated the  
11 left side of the door on the right side of the image.

12 You can proceed.

13 Q. Where was the plaintiff standing?

14 A. He was standing --

15 MR. LICHTMACHER: Objection. When?

16 THE COURT: Thank you.

17 Can you please rephrase the question, Counsel?

18 Q. Where was the plaintiff standing when you asked him to  
19 remove his clothes?

20 A. In this area right here. I don't know if you're able to  
21 see what I just circled.

22 THE COURT: Yes, the screen is touch-sensitive. For  
23 the witness, if you write on the screen, the jurors will be  
24 able to see your marking.

25 Q. Can you just draw an X where you were?

J94Qmcc2

Mitchell - Cross

1 A. I was (indicating).

2 Q. So plaintiff was relatively close to you distance-wise?

3 A. Yes.

4 THE COURT: Thank you.

5 For the record, the witness has drawn an X over the  
6 door and has drawn a circle slightly to the left of the X  
7 centered on the right frame of the door.

8 Q. I'm going to show you another photograph. Officer  
9 Mitchell, I'm showing you what's been marked as Defendant's  
10 Exhibit I for identification. Is this another view of the  
11 cell?

12 A. Yes.

13 Q. Are you familiar with this cell?

14 A. Yes.

15 MR. SIDDIQI: Your Honor, I'd ask that this photograph  
16 be shown to the jury for demonstrative purposes.

17 MR. LICHTMACHER: No objection.

18 THE COURT: Thank you.

19 Counsel, you can proceed.

20 Q. Officer Mitchell, did there come a point in time -- well,  
21 I'm sorry. Earlier you testified that the plaintiff punched  
22 you. Is that correct?

23 A. Correct.

24 Q. Can you make an indication where you were standing when the  
25 plaintiff punched you?

J94Qmcc2

Mitchell - Cross

1 A. (Indicating)

2 Q. Can you make an indication with a circle as to where the  
3 plaintiff was standing when he punched you?

4 A. (Indicating)

5 (Continued on next page)

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Mitchell - Cross

1 THE COURT: Thank you.

2 For the record, the witness has drawn an X right in  
3 front of the door shown in this image and has drawn a circle,  
4 again, just to the right of the door near the door frame.

5 BY MR. SIDDIQI:

6 Q. And you testified that you punched the plaintiff back, is  
7 that correct?

8 A. Correct.

9 Q. Did the struggle with plaintiff move away from the doorway?

10 A. Yes.

11 Q. Okay. And what area of the cell did it move to?

12 A. (Indicating.)

13 Q. Okay. And you've indicated the area of the cell in front  
14 of the toilet between the bed and the wall, is that correct?

15 A. Yes.

16 Q. Okay. I'd like to show you another photograph.

17 I'm showing you what's been marked for identification  
18 as Defendant's Exhibit J. Is this another view of the cell?

19 A. Yes.

20 Q. And are you familiar with this for the same reasons stated  
21 earlier?

22 A. Yes.

23 MR. SIDDIQI: Your Honor, I'd like to show this to the  
24 jury for demonstrative purposes.

25 MR. LICHTMACHER: No objection.

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Mitchell - Cross

1 THE COURT: Thank you.

2 Counsel, you can proceed.

3 Q. Officer Mitchell, is this a fair depiction of the area  
4 where the struggle with the plaintiff occurred?

5 A. Yes.

6 Q. And were you in one place when you were struggling with the  
7 plaintiff?

8 A. No.

9 Q. Were you moving around?

10 A. Yes.

11 Q. Was Officer Cutler also moving around?

12 MR. LICHTMACHER: Objection. When?

13 THE COURT: Thank you.

14 Counsel, can you rephrase the question.

15 Q. Was Officer Cutler also moving during the struggle with  
16 plaintiff?

17 A. Yes.

18 Q. And what was causing you and Officer Cutler to be moving  
19 around?

20 A. Inmate's resistance.

21 Q. And can you describe the areas of the cell where you were  
22 moving.

23 A. You want me to draw it like -- it would be easier if we do  
24 it that way?

25 Q. Sure.

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Mitchell - Cross

1 A. Pretty much this area and this area over here.

2 Q. I'm going to show you another picture --

3 THE COURT: Thank you. Just for the record, the  
4 witness has indicated the right side of the photograph near the  
5 wall and the floor near the -- or to the bottom of the image  
6 below the toilet.

7 Q. Officer Mitchell, I'm showing you what's been marked for  
8 identification as Defendant's Exhibit K. Is this another view  
9 of the cell?

10 A. Yes.

11 Q. And are you familiar with it for the same reasons stated  
12 earlier?

13 A. Yes.

14 MR. SIDDIQI: Your Honor, I'd like to show this to the  
15 jury for demonstrative purposes.

16 MR. LICHTMACHER: No objection.

17 THE COURT: Thank you.

18 You can proceed.

19 Q. Officer Mitchell, can you indicate again the area where the  
20 struggle was occurring between plaintiff, yourself, and Officer  
21 Cutler.

22 A. Sure. (Indicating.)

23 Q. Officer Mitchell, during that struggle, did the plaintiff  
24 bump into any of the furniture in that cell?

25 MR. LICHTMACHER: Objection. Leading, your Honor.

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Mitchell - Cross

1 THE COURT: Thank you.

2 Can you please rephrase the question, counsel.

3 Q. Officer Mitchell, was the plaintiff moving around during  
4 the struggle?

5 A. Yes.

6 Q. And did plaintiff come into contact with any of the objects  
7 depicted in this photograph?

8 MR. LICHTMACHER: Objection, your Honor.

9 THE COURT: Sustained.

10 Counsel, can you please rephrase.

11 Q. Can you please describe the manner in which plaintiff was  
12 moving around in the cell.

13 A. Violently.

14 Q. Okay. Can you please describe the areas of the cell where  
15 the movement was happening.

16 A. They're hard surfaces, along the wall and on the floor, by  
17 the bed area, and by the toilet area.

18 Q. And when you say by the bed and by the toilet, what do you  
19 mean?

20 A. Basically right next to them, like on -- like basically  
21 pretty much on top of them.

22 Q. Did you ever see the plaintiff come in contact with any of  
23 those objects?

24 A. No, I didn't see.

25 Q. Officer Mitchell, in your experience how many people can

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Mitchell - Cross

1 fit inside this cell?

2 A. It's a one-man cell, but generally, in my experience, I've  
3 seen no more than two.

4 Q. Would it be possible in your experience for six or seven  
5 people to fight inside this cell?

6 MR. LICHTMACHER: Objection.

7 A. Absolutely not.

8 THE COURT: I'm sorry. Sustained. I'm striking the  
9 answer.

10 Counsel, can you please rephrase.

11 Q. Officer Mitchell, did there come a point in time where  
12 plaintiff was brought down to the ground?

13 A. Yes.

14 Q. And were you one of the people who brought the plaintiff  
15 down the ground?

16 A. Yes.

17 Q. Okay. And did you do that in a way that could be described  
18 as gentle?

19 A. No.

20 Q. Why not?

21 A. Basically the inmate's motions was really violent and like  
22 really erratic, so he was trying to resist, so it was kind of  
23 forceful.

24 Q. And plaintiff was brought down to the ground, is that  
25 correct?

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Mitchell - Cross

1 A. Correct.

2 Q. What happened after the plaintiff was brought down to the  
3 ground?

4 A. He continued to resist.

5 Q. Did there come a point in time where plaintiff was  
6 handcuffed?

7 A. Yes.

8 Q. What did you do after he was handcuffed?

9 A. Once he was handcuffed I immediately -- I exited the area  
10 and went to seek medical attention.

11 Q. Did you escort the plaintiff out of the housing area?

12 A. No.

13 Q. Is there a reason you did not do that?

14 A. DOC policy pretty much that we -- once a -- I was involved  
15 in a use of force with the inmate that we -- we surrender them  
16 to another -- to another officer for escort purposes once  
17 they're secured.

18 Q. How did your face or your eye feel after you left the cell?

19 A. I felt a lot of pain in my eye and my wrist area and my  
20 hand area, my right hand, and my eye started to swell and  
21 bruise.

22 Q. Did you see any medical professional?

23 A. Yes.

24 Q. And did you receive any evaluation?

25 A. Yes.

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Mitchell - Cross

1 Q. What did you understand that evaluation to be?

2 A. Basically they said I had bruising and swelling on my eye  
3 and --

4 MR. LICHTMACHER: Objection.

5 A. -- tenderness -- oh, I'm sorry.

6 THE COURT: I'm sorry. I'm sorry. Give me one  
7 moment, please.

8 Thank you. Sustained. I'm striking the response.

9 Counsel, can you please rephrase the question.

10 Q. What did you understand your medical condition to be?

11 A. Basically, for lack of better words, a black eye.

12 Q. Officer Mitchell, I'm showing you what's already been  
13 entered into evidence as Plaintiff's Exhibit 1. So this is a  
14 document that plaintiff showed you earlier, which on the top  
15 right there it bears the marking C-3. And it's an employee  
16 claim. Do you recognize that document?

17 A. Yes, I do.

18 Q. Now I'd like to show only you a document -- I'm handing it  
19 also to plaintiff's counsel -- that's been marked for  
20 identification as Defendant's Exhibit L.

21 Do you recognize this document, Officer Mitchell?

22 A. Yes.

23 Q. And do you see the notation on the top right of this  
24 document that says C-3.3?

25 A. Correct, yes, I do.

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Mitchell - Cross

1 Q. And do you understand this to be a part of a package that  
2 was --

3 MR. LICHTMACHER: Objection, your Honor.

4 THE COURT: Sustained.

5 Counsel, can you please rephrase.

6 Q. Do you remember when you filled out this document?

7 A. It was part of the same packet. I would have filled it out  
8 the same time that I filled out the other paperwork.

9 Q. And is this a document that you filled out as part of your  
10 job as a correction officer?

11 A. Correct.

12 Q. And is this a document that's regularly kept in the course  
13 of business of the Department of Corrections?

14 A. Yes.

15 MR. SIDDIQI: Your Honor, at this time I would like to  
16 offer Defendant's Exhibit L into evidence.

17 THE COURT: Thank you.

18 Counsel.

19 MR. LICHTMACHER: Objection, your Honor.

20 Can I ask counsel something.

21 THE COURT: Thank you.

22 MR. LICHTMACHER: Based on time.

23 THE COURT: Thank you. You may ask counsel something.

24 (Counsel conferring)

25 MR. LICHTMACHER: Objection, your Honor. It's not in



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Mitchell - Cross

1 the JPTO.

2 THE COURT: Thank you.

3 Overruled. Please proceed. I'm accepting Defendant's  
4 Exhibit L into evidence.

5 You can proceed.

6 (Defendant's Exhibit L received in evidence)

7 MR. SIDDIQI: Thank you, your Honor.

8 BY MR. SIDDIQI:

9 Q. Officer Mitchell, I'd like to direct your attention to the  
10 portion of this document labeled A - Your Information. Do you  
11 see that?

12 A. Yes.

13 Q. And Officer Mitchell, is that your handwriting on this  
14 document?

15 A. Yes, it is.

16 Q. And Officer Mitchell, is there a portion of this  
17 document -- do you see the portion of this document saying A6?

18 A. Yes, I do.

19 Q. And what's the label on that portion of the document?

20 A. "Current injury/illness, including all body parts injured."

21 Q. And can you please tell the jury what you wrote there.

22 A. "Right pointer finger, wrist, and left facial area."

23 Q. And what were you describing in this portion of the  
24 document?

25 A. The injuries I've sustained.

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Mitchell - Cross

1 Q. And to be clear, you testified earlier you filled this out  
2 at the same time you filled out what's been entered into  
3 evidence as Plaintiff's Exhibit 1, which is the employee claim?

4 A. Yes.

5 Q. And what notation do you see on the top right of the  
6 employee claim?

7 A. C-3.

8 Q. And what notation do you see on the top right of Exhibit L?

9 A. C-3.3.

10 Q. Thank you.

11 Officer Mitchell, after this incident were you  
12 photographed?

13 A. Yes.

14 Q. I'd like to show a document only to you -- and I'm handing  
15 it over to plaintiff's counsel -- marked as Exhibit M for  
16 identification.

17 Officer Mitchell, is this a photograph of you?

18 A. Yes.

19 Q. Was it taken immediately after the incident?

20 A. Yes.

21 Q. Do you remember this photograph being taken?

22 A. Yes, I do.

23 Q. Are photographs of officers who have been involved in uses  
24 of force taken in the regular course of business of the  
25 Department of Corrections?

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1 A. Yes, it is.

2 Q. Is this a document that you understand to be generated in  
3 the regular course of business of the Department of Correction?

4 A. Yes.

5 MR. SIDDIQI: Your Honor, I would like to admit this  
6 document into evidence and publish it to the jury as  
7 Defendant's Exhibit M.

8 MR. LICHTMACHER: Objection. Not in the JPTO.

9 THE COURT: Thank you. Counsel, please come forward.

10 I'd actually like to see if I can ask that we take a  
11 short break now, if I can, ladies and gentlemen of the jury.  
12 It seems like a reasonable time to do so. You might want to  
13 have a quick bite now. I think that we may try to take about a  
14 30-minute break. So call this your lunch break, with apologies  
15 for starting a little bit early.

16 Let me give you some instructions that you'll hear me  
17 say throughout the course of the trial. Please don't discuss  
18 the case amongst yourselves; don't communicate with anyone else  
19 about the case or anyone involved in it; and don't do any  
20 research about the case or any of the issues involved in the  
21 case.

22 So with that, I'll see you back here in about half an  
23 hour. Thank you very much.

24 (Continued on next page)

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1 (Jury not present)

2 THE COURT: Good. Thank you. You can be seated.

3 The witness can step down.

4 Let me just instruct the witness, before you step  
5 away, Mr. Mitchell, you still have been called by counsel for  
6 plaintiff. As a result, I'm directing you not to discuss this  
7 matter, your testimony, with anyone during this recess,  
8 including, without limitation, counsel for defendants.

9 THE WITNESS: Yes, your Honor.

10 THE COURT: Thank you.

11 Good. So counsel, there's an objection to this  
12 exhibit. Let me note that the prior exhibit, Exhibit L, was  
13 not on the joint pretrial order. I permitted it to be  
14 introduced nonetheless because it was arguably necessary in  
15 order to complete the document that was presented by counsel  
16 for plaintiff, which was Exhibit 1, and there was an argument  
17 that that comprised a portion of that.

18 Now with respect to this Exhibit M, it's not on the  
19 joint pretrial order, and I see no reason why it should not  
20 have been expected to be. So the question, counsel for  
21 defendants, is: If you can make a showing of manifest  
22 injustice for the introduction of an exhibit that you failed to  
23 introduce prior to today, I look forward to hearing your  
24 argument.

25 MR. SIDDIQI: Your Honor, we were unaware until the

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1 trial began that the plaintiff was going to put forward a  
2 theory that the punch never occurred. This photograph clearly  
3 shows that there's a bruise on Officer Mitchell's face, so  
4 we're presenting this, or we'd like to present this document to  
5 the jury. We'd like to present this document to the jury to  
6 show that there was a bruise to the officer's face on the date  
7 of incident as rebuttal evidence.

8 Furthermore, Mr. Lichtmacher has forwarded the theory  
9 that the first time that there was any mention of a punch to  
10 the face occurred in March, weeks after the incident. This  
11 photograph is contemporaneous with the incident and would be  
12 used as rebuttal evidence to show that there was a  
13 contemporaneous documentation of the injury.

14 THE COURT: Thank you. Please hand the exhibit  
15 forward.

16 MR. SIDDIQI: Yes, your Honor.

17 THE COURT: Thank you.

18 Counsel for plaintiff.

19 MR. LICHTMACHER: Certainly.

20 Throughout the deposition, Mr. McCurdy was asked about  
21 whether the punch happened, so the theory that this is for the  
22 first time hearing he's going to say there's no punch happening  
23 is -- I don't want to call it disingenuous but it's incorrect,  
24 all right? So they've known about this for over a year. And  
25 now suddenly they need rebuttal evidence to rebut a fact that

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1 they didn't know was coming in? That's impossible to believe.  
2 This is an oversight, but I am prejudiced by it.

3 THE COURT: Thank you.

4 MR. LICHTMACHER: And just as I, you know, failed, as  
5 you pointed out, to object to certain things, you know, or  
6 include certain things, on this point, they failed to include  
7 this. I don't see why they should be allowed leeway that I'm  
8 not.

9 THE COURT: Thank you.

10 What are you referring to, other than your client?

11 MR. LICHTMACHER: You had mentioned about the -- I'm  
12 sorry -- about the medical -- I forgot. We discussed something  
13 earlier. I don't remember specifically what it was. Forgive  
14 me. But you know, the point was, you know, you have been  
15 fairly -- oh, yeah. That I failed to object to the photos on  
16 August 29th. That's what I was referring to.

17 THE COURT: Thank you.

18 MR. LICHTMACHER: Okay. Sorry about that.

19 THE COURT: That's fine.

20 So I want to talk about this, but the reason why I  
21 took the break was not to discuss this photograph but rather to  
22 discuss Mr. McCurdy. I have received some information.

23 So I've received some information, which is valuable,  
24 and I will convey the substance of what has been conveyed to  
25 me. I don't have direct personal knowledge of this. I'm

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1 summarizing the communications that have been provided to my  
2 clerk.

3 So the deputy marshal who has been purposed to help to  
4 make Mr. McCurdy available for this trial is at the MCC where  
5 Mr. McCurdy I understand is now. But Mr. McCurdy is refusing  
6 to be produced. What I understand is that he does not want to  
7 adhere to marshals policy or BOP policy. He's refusing to  
8 leave jewelry and other personal items there at the MCC. The  
9 MCC and BOP does not allow inmates to have jewelry or other  
10 personal items on their person. Additionally, as recounted to  
11 me, Mr. McCurdy is saying that he is not a federal inmate and  
12 is refusing to be housed at MCC and that he is asking to go  
13 back to Rikers Island to drop off his belongings.

14 So I wanted to break so that we could talk about this  
15 information. The last part that I just gave you I've literally  
16 just received as I began to speak. But right before I took the  
17 break I was handed a note to let me know that Mr. McCurdy was  
18 refusing to be produced, which is why I broke when I did.

19 So Mr. Lichtmacher, I will turn to you on this. Is  
20 there anything that you think that we might be able to do to  
21 encourage Mr. McCurdy to decide to appear here? I look to you  
22 for guidance, and we'll try to develop a way to help encourage  
23 him to decide to appear at his trial. Counsel, what can we do?

24 MR. LICHTMACHER: I think if your Honor conveyed to  
25 Mr. McCurdy that if he did not appear, there might be

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1 consequences to the future of his suit, that he might be  
2 inspired to comply with the BOP policies and regulations.

3 MS. GOYKADOSH: Your Honor, may I be heard on this  
4 issue as well?

5 THE COURT: Yes.

6 MS. GOYKADOSH: In line with what Mr. Lichtmacher is  
7 saying, we would move under Rule 41(b) for a dismissal of this  
8 case. We do ask that the Court warn Mr. McCurdy that if he  
9 does not appear for this trial, it will be dismissed for  
10 failure to prosecute.

11 MR. LICHTMACHER: Your Honor, I'm still hoping --

12 THE COURT: I'm sorry. Let me just say a couple  
13 things, because there are several threads here.

14 First, I don't know that I have a basis to dismiss the  
15 case under 41(b) for failure to prosecute because of this.  
16 Mr. Lichtmacher may be able to prove his case through the  
17 introduction of evidence apart from his client's testimony.  
18 It's not apparent to me at the outset how he would do so, but  
19 he might be able to do so, and he is here litigating the case  
20 on his client's behalf. As a result, it's not apparent to me  
21 at this moment what the basis for me would be to dismiss the  
22 case under 41(b).

23 I would, however, like to address -- and I say that  
24 without prejudice to any further argument that the parties  
25 would like to present to the Court. I have not given this



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1 consideration with the benefit of further argument, which I  
2 would invite.

3 MS. GOYKADOSH: Can I say one more thing.

4 THE COURT: I'm sorry. Give me one moment.

5 MS. GOYKADOSH: I'm sorry.

6 THE COURT: The related question goes to Mr. McCurdy's  
7 presence and availability as a witness here. Mr. Lichtmacher  
8 asked me a question yesterday regarding how I would treat his  
9 failure to appear -- namely, would I treat him as having  
10 functionally rested if Mr. McCurdy was not present -- and I  
11 gave a very concrete answer, which was no. That no was based  
12 on the facts as I understood them -- namely, that Mr. McCurdy  
13 was, through no fault of his own, not able to be produced here.  
14 My conclusion regarding whether we should take up the jury's  
15 time and the Court's time would be evaluated very differently  
16 if the reason why Mr. McCurdy is not appearing is because he's  
17 made a conscientious decision not to appear here to testify.  
18 If that's the case, then following the other witnesses who have  
19 been called by counsel for plaintiff, I may very well be left  
20 with little option -- I should say maybe left with a very sound  
21 option, which is to conclude that plaintiff has chosen not to  
22 testify here and to therefore require plaintiff to rest on the  
23 basis of the evidence that has been presented.

24 So at this point the limited information that I have  
25 suggests that Mr. McCurdy is making a conscious decision not to

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1 appear at this trial and to provide the testimony that  
2 presumably would be valuable in order to make out his case.

3 So what I would like to do, counsel, is to ask for  
4 your views about what we can best communicate. I am very  
5 hesitant to/I'm not willing to on this record order the  
6 Marshals to use force to have Mr. McCurdy produced here. This  
7 is not a criminal proceeding. He is not a criminal defendant.  
8 If he chooses not to appear at his trial to testify, I am not  
9 at this point willing to order the Marshals Service to use  
10 force to produce him. It is his choice. I do, however, want  
11 to encourage him to appear here.

12 So counsel for plaintiff, I look to you principally to  
13 help me understand what I can best have communicated back to  
14 him in order to help him make a decision that would lead him to  
15 be here. I want him to here. We are all here for him, and it  
16 would be unfortunate for us to have a trial without a  
17 plaintiff. So counsel, what would you propose that I do at  
18 this point?

19 MR. LICHTMACHER: I would say that what you just  
20 instructed us as to how you would proceed should be conveyed to  
21 him, and if that is in fact conveyed to him and if it doesn't  
22 inspire him to show up, I would be perplexed, for lack of a  
23 better term, your Honor, or word.

24 THE COURT: Thank you.

25 Give me one moment. Let me propose text that I would

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1 send back through the Marshals to be communicated to  
2 Mr. McCurdy.

3 Thank you. So I could send the following  
4 communication back to Mr. McCurdy, if this is acceptable to the  
5 parties: "Please let Mr. McCurdy know that his counsel wants  
6 him to appear to testify. If he chooses not to appear for  
7 trial, the Court is likely to require the plaintiff to rest his  
8 case after the officers' testimony, which is expected to  
9 conclude today."

10 Counsel, what do you think about that communication?  
11 First, counsel for plaintiff, is there anything else I can say  
12 here or do you have any word choice, suggestions, or any other  
13 ways that we might be able to communicate effectively with  
14 Mr. McCurdy? I again look to you for your guidance.

15 MR. LICHTMACHER: Give me ten seconds to ponder it.

16 THE COURT: Thank you. Please take your time.

17 MR. LICHTMACHER: Could you include that his counsel  
18 adds that should he not prevail with him not showing up, his  
19 chances of rejuvenating this case on appeal are de minimis?  
20 Are small; let's put it that way. Does the Court believe that  
21 would be appropriate?

22 THE COURT: I would frame it to make it clear that  
23 this is a communication from you and not the Court.

24 MR. LICHTMACHER: Yes, absolutely.

25 THE COURT: Thank you.

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1           Thank you. Give me just one moment and I will tell  
2           you what I would send back.

3           Thank you. So the message that I would send back  
4           would say the following. It would be introduced with the  
5           following words:

6           "Please let Mr. McCurdy know the following: His  
7           counsel wants him to appear to testify. If he chooses not to  
8           appear for trial, the Court is likely to require the plaintiff  
9           to rest his case after the officers' testimony, which is  
10          expected to conclude today.

11          "His counsel also wants to communicate to Mr. McCurdy  
12          that if he chooses not to appear at trial and loses as a  
13          result, that the likelihood that the case will be rejuvenated  
14          on appeal is very small."

15          Let me put that in easier language. Let me just  
16          change it to make it simpler language.

17          MR. LICHTMACHER: Could you change from -- I think you  
18          said "would be rejuvenated." Let's make it "could be  
19          rejuvenated."

20          THE COURT: Thank you.

21          I modified the language because I thought it was  
22          unnecessarily wordy. So the last sentence would read: "His  
23          counsel also wants to communicate to Mr. McCurdy that if he  
24          chooses not to appear at the trial and loses as a result, that  
25          it is not likely that the case could be rejuvenated on appeal."

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1 Is that fair, counsel for plaintiff?

2 MR. LICHTMACHER: Extremely fair, your Honor.

3 THE COURT: Thank you. So I will send this note.

4 MS. GOYKADOSH: Your Honor, may I be heard on the  
5 note.

6 THE COURT: Yes.

7 MS. GOYKADOSH: Thank you, your Honor.

8 I understand that this is a communication from  
9 plaintiff's counsel to plaintiff, so I don't want to insert  
10 myself into this.

11 THE COURT: Thank you.

12 MS. GOYKADOSH: However, there are concerns I have  
13 about the rest of this trial based on plaintiff's conduct now,  
14 so I just want to very quickly talk about some of the threads  
15 that your Honor mentioned and how they might impact the note,  
16 if that's okay.

17 THE COURT: I'm sorry. Some of the what?

18 MS. GOYKADOSH: Like the threads your Honor mentioned,  
19 that there are a few threads to this issue.

20 So I think one of the threads of this issue is that  
21 the jury has been instructed multiple times that plaintiff is  
22 not here through no fault of his own, and that's been accurate.

23 THE COURT: I'm sorry. Is this something that will  
24 inform the content of the note? Because I'd like to send it  
25 back as promptly as possible.

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1 MS. GOYKADOSH: Yes. So I'll just start backwards.

2 So I think the Court should also tell plaintiff that  
3 the Court might instruct the jury that plaintiff chose not to  
4 be here.

5 THE COURT: Thank you.

6 I don't expect that I would do that. That would be me  
7 testifying. They will have an absence of evidence but not a  
8 statement that he was not here properly. I may need to unring  
9 the bell about not holding his lack of presence here against  
10 him. It will need to be clear that they need to evaluate the  
11 evidence, which includes here a lack of evidence from  
12 plaintiff, so I will need to do something to change the nature  
13 of my prior instructions, but I don't expect to instruct them  
14 regarding facts that have not been put into evidence here.  
15 Instead, I would expect to permit the jury, or the Court,  
16 depending on what the evidence is, to make a finding regarding  
17 the case based on the evidence or lack of evidence.

18 MS. GOYKADOSH: I understand, your Honor.

19 I have nothing further regarding the note. I do have  
20 two other things, but I understand the note is urgent right  
21 now, so I'll wait until that's done.

22 THE COURT: Thank you.

23 So I'm going to send the following note to my clerk,  
24 who will then communicate it to the Marshals. It reads as  
25 follows:

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1           "Please let Mr. McCurdy know the following: His  
2 counsel wants him to appear to testify. If he chooses not to  
3 appear for trial, the Court is likely to require the plaintiff  
4 to rest his case after the officers' testimony, which is  
5 expected to conclude today.

6           "His counsel also wants to communicate to Mr. McCurdy  
7 that if he chooses not to appear at the trial and loses as a  
8 result, that it is not likely that the case could be  
9 rejuvenated on appeal."

10           So I'm sending this note right now to my clerk, who  
11 will communicate it to the Marshals, and with luck, this will  
12 work. Otherwise, unfortunately we'll be left to deal with the  
13 consequences of Mr. McCurdy's decision here. We should  
14 hopefully have a response promptly.

15           So counsel, I do want to start up again with the jury  
16 very promptly, so I want to step down. I'm going to eat  
17 something quickly. I encourage you to do the same. I want to  
18 begin again at 11:45 with the jury.

19           I'm going to let in Plaintiff's Exhibit M. I  
20 recognize that it's not included in the joint pretrial order,  
21 but the evidence is properly presented as rebuttal evidence in  
22 light of the arguments made today that the facial injury did  
23 not occur. This is ultimately a truth-gathering exercise, and  
24 I believe that this photograph from the time should be  
25 introduced. I believe it's in the interest of justice to do

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1 so.

2 So I'll see you back here, counsel, at 11:45.

3 MS. GOYKADOSH: I'm sorry, your Honor. First, I think  
4 your Honor said Plaintiff's Exhibit M. It's Defendant's  
5 Exhibit M, just to be clear.

6 THE COURT: Thank you.

7 MS. GOYKADOSH: Second, will I have a chance to be  
8 heard on these issues after the break? I just want to make  
9 sure my record is clear.

10 THE COURT: Yes, but it will have to be very quick  
11 because I want to start with the jury promptly.

12 MS. GOYKADOSH: Yes. Thank you, your Honor.

13 THE COURT: Thank you. I'll see you all back here in  
14 about five minutes for you all?

15 MR. LICHTMACHER: Five minutes? Five minutes?

16 THE COURT: Yes.

17 (Luncheon recess)



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## AFTERNOON SESSION

11:48 a.m.

(In open court; jury not present)

THE COURT: Counsel, we're back after our lunch break.

Counsel for defendants, what was the additional comment that you wanted to make on the record before we bring the jury back in?

MS. GOYKADOSH: Very quickly, your Honor.

With regards to the Rule 41(b) issue, we believe that we will be prejudiced if we're not able to cross-examine plaintiff. One of the issues in this case is the parties' credibility. There are two very different sets of facts about what happened in this case. I should be able to question plaintiff, the jury should be able to evaluate who he is as a witness, and to the extent that we're not able to do so, we are prejudiced.

My colleague had a case before Judge Daniels in the Southern District. I will let him just very quickly talk about it.

MR. SIDDIQI: Very quickly, your Honor, the case had almost identical circumstances. The name of the case was Kevin Fortune v. City of New York, 15 Civ. 7088. In that case, the morning of trial, plaintiff's counsel appeared and informed the Court that -- plaintiff was not incarcerated -- plaintiff was refusing to appear for trial and did not want to testify. On

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1 the basis of plaintiff's refusal to testify, Judge Daniels  
2 dismissed that case pursuant to Rule 41(b).

3 MR. LICHTMACHER: May I, your Honor.

4 THE COURT: Thank you.

5 MR. LICHTMACHER: Well --

6 THE COURT: I'm sorry. Can I ask, were there other  
7 plaintiff's witnesses in that case?

8 MR. SIDDIQI: Your Honor, at this time I don't recall  
9 if plaintiff was planning to call the officers in his case in  
10 chief.

11 THE COURT: Thank you.

12 Please go on, counsel.

13 MR. LICHTMACHER: In *Soto v. New York City*, my  
14 plaintiff refused to show up. He had been shot in the  
15 testicle, in the back, and through his side and beaten by New  
16 York City police officers, and he refused to show up. And  
17 there was another plaintiff who had de minimis injuries. That  
18 was before Judge Abrams. And she allowed us to proceed to a  
19 verdict -- not a good one, but -- for both plaintiffs, you  
20 know, despite his absence.

21 Now even though Mr. McCurdy's excuse for not appearing  
22 may not be great legal justification, and I acknowledge that,  
23 you know, at least in the Court's eyes, I'm sure it's not; in  
24 his eyes, it is.

25 There are a couple of options that we have here. If

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1 they really feel that they'll be prejudiced, they could admit  
2 such parts of his deposition testimony as they feel, you  
3 know --

4 THE COURT: Can I just comment on one thing, because I  
5 failed to appreciate the argument made by Ms. Goykadosh. I  
6 just want to begin my remarks to explain my lack of  
7 understanding regarding the basis for those comments with the  
8 basic principle that statements by counsel are not evidence, so  
9 to the extent that the prejudice described by Ms. Goykadosh is  
10 that there are two versions of the event and that therefore  
11 they must cross-examine the plaintiff in order to hear the  
12 other side of his version of the events, I want to raise the  
13 basic principle that there is no version of the events by  
14 plaintiff in the record unless and until he testifies. My hope  
15 and expectation is that the jury will follow my instruction  
16 that arguments by counsel are not evidence. So counsel for  
17 defendant, can you explain your concern regarding prejudice  
18 further, because as far as I know, until plaintiff testifies,  
19 his version of the facts are not in evidence.

20 MS. GOYKADOSH: Yes, your Honor.

21 I understand, and perhaps I didn't speak as clearly as  
22 I should before. What I meant when I said plaintiff's version  
23 of events and there are two versions of events is that  
24 plaintiff's version of events lacks credibility, so if I do  
25 have the opportunity to cross-examine him, the jury will be

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1 able to assess his credibility based on how he recounts the  
2 version of events. So for instance, one thing that --

3 THE COURT: I'm sorry. Just to be clear, is the  
4 defense more prejudiced by your not being able to cross-examine  
5 him regarding his testimony or is it more prejudiced by hearing  
6 him testify? That's the fundamental question that I have  
7 regarding your comments.

8 MS. GOYKADOSH: About more? With regards to more, I  
9 don't really think I can answer that at this point.

10 THE COURT: So the defense's preference is to have  
11 Mr. McCurdy appear; you think it's more beneficial to you to  
12 have Mr. McCurdy appear here to testify, is that right?  
13 Because it's more important for you to have his version of the  
14 events in evidence and then to be able to show why you believed  
15 them not to be credible through cross-examination. That's the  
16 prejudice that you're describing, as I understand it, counsel.

17 MS. GOYKADOSH: In my application for dismissal of  
18 this action, at this point.

19 THE COURT: Thank you.

20 Again, and given that there's no testimony by  
21 Mr. McCurdy in evidence at this point and given that, counsel,  
22 you're burning up the clock during which the officers might  
23 otherwise be testifying, I again will permit you to renew your  
24 application under Rule 41 to the extent that application is  
25 based on asserted prejudice because of the inability to

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1 cross-examine a witness regarding his version of events when  
2 that person has not testified about his version of events. I  
3 will expect that the jury will accept, as we all do, that  
4 statements by counsel are not evidence and that only testimony  
5 by witnesses are evidence.

6 MS. GOYKADOSH: I understand, your Honor. Thank you.

7 THE COURT: So at this point I will decline that  
8 application, but again, I will invite further application.

9 Counsel, would you like to proceed and to permit the  
10 witnesses to continue their testimony, or would you like to  
11 continue discussing further issues?

12 MR. SIDDIQI: We'd like to proceed, your Honor.

13 The only thing, in terms of unringing the bell, I just  
14 want to make sure that we address what you had talked about  
15 before with saying repeatedly that Mr. McCurdy was not here  
16 through no fault of his own.

17 THE COURT: Counsel, let me first convey some  
18 information. But let me first try to be clear. I'd like to be  
19 responsible to the jury. So if there are issues that we must  
20 take up right now, then I invite conversation about them. If  
21 these are issues that need not be taken up right now so that I  
22 can bring the jury back in at the time that I committed to  
23 bring them back in, I'd prefer to defer as to them.

24 So this issue only arises if Mr. McCurdy does not  
25 appear prior to the completion of the testimony of the

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1 officers. Counsel for the defendants, you appear to wish to  
2 spend a significant amount of time in colloquy with the Court  
3 about issues rather than proceeding with the officers'  
4 testimony. Is this something that we need to address now, or  
5 would you prefer to take this issue up after the officers have  
6 testified?

7 MR. SIDDIQI: I apologize, your Honor. We share your  
8 preference to continuing with questioning.

9 THE COURT: Thank you. I have no preference. I just  
10 want to make sure that I appreciate the strategic decisions  
11 being made by counsel.

12 MR. LICHTMACHER: Extremely brief.

13 THE COURT: Yes.

14 MR. LICHTMACHER: In terms of Exhibit 8, the medical  
15 records, I'd like to introduce them, the certified records,  
16 before I rest. We're waiting on your order. Unless I'm  
17 allowed to introduce them afterwards, which would be fine too,  
18 but, you know, I'd like to know how to proceed on that.  
19 Obviously I don't want to hand them to the jury, publish them  
20 to the jury before you decide on what redactions to make.

21 THE COURT: Thank you. That's fine.

22 All right. So let me just give you some information  
23 that's been conveyed to me from the Marshals Service. And  
24 again, I haven't had these communications directly. I'm just  
25 relating what's been forwarded to me through email traffic.

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Mitchell - Cross

1           In response to the message that we forwarded to the  
2 Marshals Service regarding a message to convey to Mr. McCurdy,  
3 I received a message back that says, in essence, that McCurdy  
4 is not complying and that the corrections officers are taking  
5 him back to Rikers Island. So I'm seeking confirmation to  
6 ensure that the message was conveyed to him. I expect that it  
7 was, given the chronology of the email exchange that's been  
8 forwarded to me, but I will seek confirmation of that.

9           With respect to the disputes regarding the redacted  
10 Exhibit 8, I agree with counsel for plaintiff that each of the  
11 terms that are disputed are relatively straightforward and  
12 within the ken of a lay juror without the need for further  
13 expert testimony, so I'll permit their introduction with the  
14 redactions as currently contemplated.

15           MR. LICHTMACHER: Thank you, your Honor.

16           THE COURT: Good. Thank you.

17           Ms. Nelson, could you please bring in the jury.

18           (Continued on next page)  
19  
20  
21  
22  
23  
24  
25

J941mcc3

Mitchell - Cross

1 (Jury present)

2 THE COURT: Thank you. You can be seated.

3 Good. So Mr. Mitchell, please come forward.

4 Counsel for defendants, please proceed.

5 MR. SIDDIQI: Your Honor, I believe my application to  
6 move Exhibit M into evidence was pending before the break.

7 THE COURT: Thank you. I will accept Defendant's  
8 Exhibit M into evidence.

9 (Defendant's Exhibit M received in evidence)

10 THE COURT: You can proceed.

11 MR. SIDDIQI: Your Honor, can it please be published  
12 to the jury.

13 THE COURT: You may.

14 MS. GOYKADOSH: I'm sorry, your Honor. The screen is  
15 dark. I can't --

16 Thank you. Thank you.

17 BY MR. SIDDIQI:

18 Q. Officer Mitchell, when was this photograph taken?

19 A. Immediately after the incident on the -- on February 19,  
20 2015.

21 Q. And is it a fair and accurate representation of what you  
22 looked like after the incident?

23 A. Yes.

24 Q. And when we're saying "the incident," can you please  
25 describe what, if anything, Mr. McCurdy did to you during that



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Mitchell - Cross

1 incident.

2 A. After the incident where inmate McCurdy punched me in the  
3 face.

4 Q. Was this photograph taken for any particular reason?

5 A. It's standard protocol after use of force that officers  
6 also are photographed; the parties involved are photographed.

7 Q. I'm going to zoom in here.

8 Officer Mitchell, do you see anything on this area of  
9 your face?

10 A. Yes.

11 Q. And what is that?

12 A. Bruising.

13 Q. And again, on this portion of the photograph, do you see  
14 anything on your face where the finger is pointing?

15 A. Yes, bruising.

16 Q. Okay. And what caused that bruising?

17 A. The punch to the face.

18 Q. And what does it say was the date and time of the incident?

19 A. February 19, 2015, approximately 1445 hours, or 2:45 p.m.

20 Q. And do you see there it says the date that the photograph  
21 was taken?

22 A. Yes, February 19, 2015.

23 Q. Do you remember this photograph being taken?

24 A. Yes.

25 Q. And one more time for the jury, can you tell us what this

J941mcc3

Mitchell - Cross

1 is a photograph of.

2 A. It's a photograph of me after, immediately after the  
3 incident. It's a photograph of my face, the left side of my  
4 face, which appeared to be bruising.

5 Q. And again, this was taken after the incident.

6 A. Yes.

7 Q. The same day as the incident.

8 A. Yes.

9 Q. Officer Mitchell, at the time that you were engaged in a  
10 struggle with the plaintiff, who else was in the cell?

11 A. Officer Cutler.

12 Q. Were any other officers in the cell?

13 A. No.

14 Q. Was Captain Bell in the cell?

15 A. No.

16 Q. Did Captain Bell ever come in the cell during the struggle?

17 A. No.

18 Q. Was Captain Bell there when you asked plaintiff to comply  
19 with a strip search?

20 A. No.

21 Q. Is there a reason why she was not in the area?

22 A. Because female officers or captains are not allowed to be  
23 in the area when a male inmate is strip-searched.

24 Q. Before you described for the jury the movement within the  
25 cell when the plaintiff was resisting. Can you please describe

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Mitchell - Cross

1 for the jury the manner in which the plaintiff was resisting.

2 A. Violently.

3 Q. Can you please describe what movements he was making.

4 A. Purposeful movements to basically force my -- forceful  
5 movements, purposeful movements to force me off of him.

6 Q. And was plaintiff successful in forcing you off of him?

7 A. Eventually, no, he wasn't.

8 Q. But in the beginning?

9 A. Yes.

10 Q. And did that cause you to move around the cell?

11 A. Yes.

12 Q. Did that cause you to come into any contact with any  
13 furniture in the cell?

14 MR. LICHTMACHER: Objection. Leading.

15 THE COURT: Thank you.

16 Counsel, can you please rephrase the question.

17 Q. Can you describe what happened to you as a result of being  
18 moved around by the plaintiff.

19 A. Being moved, I began to bump into objects like the wall and  
20 the floor, hitting the floor, things like that.

21 Q. And was your body -- were you holding onto plaintiff when  
22 that was happening?

23 A. Yes.

24 MR. LICHTMACHER: Objection, your Honor. Leading.

25 THE COURT: Thank you.

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Mitchell - Cross

1 Can I ask you to please rephrase the question,  
2 counsel.

3 MR. SIDDIQI: Yes, your Honor.

4 BY MR. SIDDIQI:

5 Q. Was your body in contact with plaintiff's body when that  
6 was happening?

7 A. Yes.

8 Q. How was your body in contact with the plaintiff's body?

9 A. Basically I had a -- like similar to a bearhug hold  
10 control, like on his upper body, his arm and -- his arms and  
11 his shoulder area.

12 Q. And you just testified that you bumped into furniture?

13 A. Yes.

14 Q. Were you engaged in that hold that you just described with  
15 plaintiff at that time?

16 A. Yes.

17 Q. How long was the period of time between the plaintiff  
18 punching you and the time that he was eventually placed into  
19 handcuffs?

20 A. I don't recall that exact amount of time.

21 (Continued on next page)

J94Qmcc4

Mitchell - Cross

1 Q. Now, you said that the plaintiff said to you that he was  
2 going to cut you. Is that correct?

3 A. Correct.

4 Q. Did that cause any reaction in you?

5 A. Yes, it alarmed me.

6 Q. Why did it alarm you?

7 A. Because I didn't want to be cut. It alarmed me because I  
8 just had been in an incident in the commissary involving a  
9 sharpened weapon so I didn't know if the inmate was in  
10 possession of any other contraband.

11 Q. Officer Mitchell, at any point did Captain Bell direct you  
12 to beat the plaintiff?

13 A. No.

14 Q. Did Captain Bell ever direct you to use force against the  
15 plaintiff?

16 A. No.

17 Q. Did you see Officer Cutler use force against the plaintiff?

18 A. Yes.

19 Q. Can you please describe that force for the jury.

20 A. Basically lower body control hold similar to what I had on  
21 his upper body. Had his arms wrapped around his legs so we  
22 could bring him down to the ground.

23 Q. Why did you and Officer Cutler want to bring the plaintiff  
24 to the ground?

25 A. Basically, so we could prevent him from moving around too

J94Qmcc4

Mitchell - Cross

1 much to secure him a little easier.

2 Q. Why did you want to secure him?

3 A. Because he had just assaulted me and he just threatened me.

4 Q. Did you ever kick the plaintiff?

5 A. Never, no.

6 Q. Did you ever kick the plaintiff in the face?

7 A. No.

8 Q. Did you use any force against the plaintiff?

9 A. Yes.

10 Q. Can you please describe that force for the jury?

11 A. Just the upper body control hold, which I said before the  
12 bear hug hold, basically trying to get his arms behind his back  
13 and secure him to prevent his movements.

14 Q. How did you respond when the plaintiff punched you in the  
15 face?

16 A. I immediately threw back a punch.

17 Q. Was there a purpose for throwing the punch?

18 A. Basically to gain a distance and prevent him from punching  
19 me again and continue the aggression.

20 Q. Officer Mitchell, what was going through your head when the  
21 plaintiff attacked you?

22 A. Pretty much fear. I didn't want to be hit again or get --  
23 like be further assaulted or any of my coworkers to be further  
24 assaulted.

25 MR. SIDDIQI: If I can just have a moment, your Honor.

J94Qmcc4

Mitchell - Redirect

1 THE COURT: Thank you. Please take your time.

2 Q. Officer Mitchell, as you saw in Defendant's Exhibit L, did  
3 you submit a form documenting your facial injury immediately  
4 after the incident?

5 A. Yes.

6 MR. SIDDIQI: I have no further questions, your Honor.  
7 I reserve the right to call this witness for rebuttal.

8 THE COURT: Thank you.

9 Counsel for plaintiff.

10 MR. LICHTMACHER: Yes, your Honor.

11 THE COURT: Thank you. Please proceed.

12 REDIRECT EXAMINATION

13 BY MR. LICHTMACHER:

14 Q. Did I hear you correctly, you said Captain Bell wasn't  
15 there during the use of force?

16 MR. SIDDIQI: Objection. Mischaracterization.

17 THE COURT: Thank you.

18 You can answer the question.

19 A. Yes.

20 Q. Yes, she wasn't there?

21 A. Yes, you heard me correctly, she wasn't there.

22 Q. OK. You gave a deposition. We talked about it before in  
23 this case, where you swore under penalty of perjury, correct?

24 A. Correct.

25 Q. Did you give the following answers to the following

J94Qmcc4

Mitchell - Redirect

1 questions.

2 MR. LICHTMACHER: Does the witness have the deposition  
3 in front of him still, your Honor?

4 A. Yes, I do.

5 Q. Please turn to page 17, line 5. Are you ready, sir?

6 A. One second. Yes, I am.

7 Q. Did you give the following answers to the following  
8 questions under oath at your deposition.

9 "Q. Now, to your knowledge, did Captain Bell, was she -- it's  
10 a she, Captain Bell, correct?

11 "A. Yes.

12 "Q. Was she involved in use of force that day, February 19,  
13 2015?

14 "A. No.

15 "Q. Was she present for the use of force?

16 "A. Yes."

17 You gave those answers to those questions on that day  
18 under oath, didn't you, sir?

19 A. Yes.

20 Q. And, in fact, now you've changed your mind, haven't you?

21 A. No, I didn't change my mind.

22 Q. Well, did you get a copy of the transcript?

23 A. Yes, I did.

24 Q. And you changed that answer?

25 A. No, I didn't change the answer, sir.



J94Qmcc4

Mitchell - Redirect

1 Q. So you understand that the two are very contradictory, sir,  
2 do you not?

3 A. I see where the confusion would be, but no, she wasn't in  
4 the area. Like she wasn't -- she wasn't in the cell or with  
5 the use of force. She was in the housing area but not in that  
6 area.

7 Q. So "Was she present for the use of force?

8 "Yes" means to you she wasn't in the immediate area.  
9 Is that what it means?

10 A. Yes.

11 Q. Now, sir, you indicated in Exhibit L, which the defendants  
12 admitted into evidence if you look at it, you indicated that  
13 Exhibit L was part of the submission you made for the workers'  
14 comp. application. Is that correct?

15 A. Yes.

16 Q. OK. Now, this particular exhibit, if I understand it, it  
17 says "limited release of health information."

18 By the way, is this published to the jury now? It's  
19 not on? Can we have it on? Thank you.

20 It's in evidence. I could do it from there if you  
21 can't. You got it? Is the jury able to see it now?

22 OK. Now, this document admitted into evidence as  
23 Defendant's Exhibit L is a limited release of health  
24 information. Is that correct, sir?

25 A. Yes.

J94Qmcc4

Mitchell - Redirect

1 Q. And it's part of your workers' comp. application, correct?

2 A. Yes.

3 Q. And it's your understanding that it's generated by you to  
4 allow workers' comp. to get your medical information. Is that  
5 correct?

6 A. Yes.

7 Q. How come you didn't sign it? Take a look under C.  
8 Claimant's signature. There's no signature there, is there?

9 A. OK, yes.

10 Q. And you didn't date it either, did you?

11 A. No, the date was written up here at the top.

12 Q. Well, that's the date of the incident, isn't it? Because  
13 you even indicated that you didn't go -- that the other --  
14 excuse me -- I think your healthcare was provided on the 20th,  
15 the day after the incident, is that correct, or am I wrong  
16 about that?

17 A. The healthcare was provided the same day.

18 Q. At the hospital also?

19 A. Correct.

20 Q. I stand corrected. OK.

21 The second document that you generated, number two is  
22 dated on March 4, correct? Do you want to see that one again?  
23 Let's take a look at it. That's dated on March 4. See, this  
24 is Plaintiff's number 2. So now you generated this document on  
25 March 4, apparently, which is near your signature. And you

J94Qmcc4

Mitchell - Redirect

1 don't have a date on L or a signature to release your medical  
2 information. Is that because you didn't generate this document  
3 until well after the incident?

4 A. No, sir.

5 Q. Well, in fact, are you aware that medical records can't be  
6 released without a signature?

7 A. Correct.

8 Q. So this is the document that you are allegedly providing to  
9 workers' comp. to get healthcare because you were injured by a  
10 punch in the face with no signature and no date on it. Is that  
11 correct?

12 A. Correct.

13 Q. Now, we took a lot of photographs that the defendants  
14 produced when they directed you -- when they did direct  
15 examination of you. And in those photographs there were  
16 several photographs of the inside of the cell, correct?

17 A. Yes.

18 Q. And is it fair to say there are no soft spots in that  
19 entire cell?

20 A. Correct.

21 Q. In fact, everything in that cell is either metal or  
22 whatever the floor is made of. I take it the floor is not made  
23 of a soft material?

24 A. Correct.

25 Q. And the bed was a metal frame, right?

J94Qmcc4

Mitchell - Redirect

1 A. Yes.

2 Q. And the picture was pretty much the way it looked the date  
3 of the incident?

4 A. Yes.

5 Q. So if you went facedown to the floor, if you had the front  
6 of your body first, you could have banged your head or your eye  
7 area in going to the floor, couldn't you?

8 A. It's possible, yes.

9 Q. Or on the toilet, correct?

10 A. It's possible, yes.

11 Q. And you went down when you were taking McCurdy down,  
12 correct?

13 A. Correct.

14 Q. Now you talked about pepper spray and OC spray, I think you  
15 said, correct?

16 A. Yes.

17 Q. Are they the same thing, OC spray and pepper spray?

18 A. Yes, they are the same thing.

19 Q. And you said you couldn't use it because you were too close  
20 to be effective. Is that correct?

21 A. Correct.

22 Q. Actually, that's not correct, is it, sir?

23 MR. SIDDIQI: Objection.

24 THE COURT: Thank you.

25 Can you please rephrase the question?

J94Qmcc4

Mitchell - Redirect

1 MR. LICHTMACHER: Sure.

2 Q. Actually, pepper spray comes out of a can in a small stream  
3 that gradually expands. Isn't that true?

4 A. No, sir.

5 Q. Well, isn't it true that occasionally corrections officers  
6 and police officers get injured because they're in an area that  
7 was sprayed and the spray goes out over a long area and hits  
8 more than one person?

9 MR. SIDDIQI: Objection.

10 THE COURT: Thank you.

11 You can answer the question.

12 A. That's correct, but it's disbursed in a cone actually and  
13 it has a wider range.

14 Q. Ahh, a wider range in a cone, but when it first comes out,  
15 it comes out of a little tiny hole in the top of the can or the  
16 canister, correct?

17 A. Correct, in a cone shape, yes.

18 Q. Yeah, but when it first comes out, sir, doesn't it come out  
19 as a quick little spray? Doesn't it come out -- excuse me.  
20 Doesn't it come out in a tight little circle when it first  
21 comes out?

22 A. If I went too close, yes.

23 Q. Well, it flies -- and at that point when it comes out that  
24 way, it's actually more powerful than it is at a distance,  
25 isn't it, because it's more concentrated. Isn't that correct,

J94Qmcc4

Mitchell - Redirect

1 sir?

2 THE COURT: You can answer the question.

3 A. Because it's more concentrated, that's the issue with our  
4 policy. Our policy dictates that we be three feet of distance  
5 before we utilize spray or we'll be in violation of our policy.

6 Q. So is kicking somebody on the floor, isn't it?

7 MR. SIDDIQI: Objection.

8 THE COURT: Thank you.

9 Can you please rephrase the question, Counsel?

10 MR. LICHTMACHER: Sure.

11 Q. Is it a violation of your policy to kick somebody?

12 A. Yes.

13 Q. And it's a violation of your policy to punch someone when  
14 they're in handcuffs, correct?

15 A. Correct.

16 Q. And you describe where McCurdy was and where you were in  
17 the photographs, and it didn't look like you were right on top  
18 of each other when the incident started, were you?

19 A. We were.

20 Q. Well, initially you made circles and X's, and it seemed  
21 like there was a little separation between the two of you,  
22 wasn't there?

23 A. That's objective.

24 Q. Well, I'm asking you. You were there. I wasn't there.

25 A. And I pretty much just said he was a lot closer than you

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Mitchell - Redirect

1 think the pictures made.

2 Q. Did you ever pull out the spray to threaten him?

3 A. No. That's not allowed.

4 Q. You're not allowed to threaten him. You're not allowed to  
5 pull it out and say, hey, I don't want to spray you?

6 A. It's the same as menacing. No, we wouldn't be able to do  
7 that.

8 Q. And you say you were too close to spray him, correct?

9 A. Correct.

10 Q. Because if you're too close and you spray him, it would  
11 have violated the policy. Is that the entire reason that you  
12 didn't do it?

13 MR. SIDDIQI: Objection, your Honor. Asked and  
14 answered.

15 THE COURT: Thank you.

16 You can answer the question.

17 A. It's not the only reason. It was, like I said, my  
18 movements were in reflex. They weren't -- like my first  
19 reaction was to defend myself and to basically create distance.

20 Q. Correct me if I'm wrong. In my earlier examination of you,  
21 you indicated in sum and substance that you couldn't see if he  
22 was injured, and it seemed to me as if you were indicating  
23 because you were having trouble seeing at that point in time.

24 Is that correct?

25 A. Correct.

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Mitchell - Redirect

1 Q. And that was because your left eye was in some way injured?

2 A. Correct.

3 Q. And the picture in M, that was very shortly taken after the  
4 incident? M in evidence.

5 A. Yes.

6 Q. And may I, that's your left eye?

7 A. Yes.

8 Q. It doesn't look very teary, does it?

9 THE COURT: Thank you. Sustained.

10 Please rephrase the question.

11 Q. OK. Do you see anything in that picture that indicates to  
12 you you were having trouble seeing out of that eye?

13 MR. SIDDIQI: Objection.

14 THE COURT: Thank you.

15 You can answer the question.

16 A. No, a picture can't basically wouldn't be able to see if I  
17 had problems seeing.

18 Q. Well, does your eye look red in that picture?

19 A. Not according to the picture, no.

20 Q. And your eye -- is your eye tearing in that picture?

21 A. Again, I say that the picture won't be able to capture how  
22 I -- my vision.

23 Q. I'm asking you, was your eye tearing in that photograph?

24 Please answer my question.

25 A. No, it doesn't appear to be tearing.



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Mitchell - Redirect

1 Q. It does not, does it, sir?

2 A. It doesn't appear to be tearing.

3 Q. Now, you seemed to indicate in your examination by counsel  
4 that it's department policy for people involved in the use of  
5 force, all parties, to have photographs taken of them, correct?

6 A. Correct.

7 Q. And that includes the person who force was used against,  
8 correct?

9 A. Correct.

10 Q. So, under those circumstances, it would be appropriate to  
11 take photos of McCurdy -- excuse me -- of Chance McCurdy the  
12 date of the incident, correct?

13 A. Yes, it would have been appropriate to take photographs of  
14 inmate McCurdy.

15 MR. LICHTMACHER: I want to show this only to the  
16 witness. Well, your Honor, may I approach?

17 THE COURT: You may.

18 MR. LICHTMACHER: Approach the witness, not the bench.

19 May the record reflect that I've handed the witness a  
20 document marked for identification as Plaintiff's 10.

21 Q. Now, do you recognize who is depicted in this photo?

22 A. Yes.

23 Q. And who is depicted in this photo?

24 A. It appears to be inmate McCurdy.

25 Q. And do you know from looking at this document whether or

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Mitchell - Redirect

1 not it was generated on the date of the incident?

2 A. Yes.

3 Q. In fact, it's got the insignia of the department of  
4 corrections on it, correct?

5 A. Correct.

6 Q. And it says AMCK or Anna M. Kross Center, correct?

7 A. Yes.

8 Q. It's entitled incident photo, correct?

9 A. Yes.

10 MR. LICHTMACHER: Your Honor, I offer this into  
11 evidence as Plaintiff's 10.

12 MR. SIDDIQI: Objection, your Honor. We ask for a  
13 sidebar.

14 THE COURT: Thank you. Come on up.

15 (Continued on next page)

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Mitchell - Redirect

1 (At the side bar)

2 THE COURT: Thank you.

3 So at this point I would sustain the objection because  
4 you haven't laid a foundation for introduction of this  
5 photograph. The witness hasn't stated that he's seen it  
6 before. All he's done is read from it. So I understand that  
7 to be the basis for the objection.

8 Is that correct, counsel for defendants?

9 MR. SIDDIQI: That's correct, your Honor. The witness  
10 is not competent to testify as to this photograph. He didn't  
11 take the photograph. He merely has testified that he knows  
12 it's the practice that everyone involved is photographed.  
13 There's no foundation for him to testify as to this photograph.

14 THE COURT: Thank you.

15 Counsel.

16 MR. LICHTMACHER: Your Honor, he's testified that in  
17 sum and substance the custom and practice is to take the photos  
18 after use of force. He's testified that the Anna M. Kross, the  
19 AMKC, is indicated on the document. He's testified that it's  
20 an incident photo. He's testified that the department of  
21 corrections insignia is on the photo. He recognizes Chance  
22 McCurdy on the photo, and it's dated 2/19/15, which is the date  
23 of the incident.

24 Your Honor, there is plenty in there for a substantial  
25 foundation to let it in. Whether or not he's seen it before he

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1 can be questioned about, I understand that, but the  
2 admissibility of it under these circumstances is that this is a  
3 correct foundation.

4 THE COURT: Thank you.

5 Counsel for defendants.

6 MR. SIDDIQI: Your Honor, again, for the same reasons  
7 stated earlier, just as a procedural matter it seems the  
8 coloration on the version the plaintiff is going to show to the  
9 jury is significantly different from the one we've been  
10 provided.

11 But with regards to the substance of this, this  
12 witness did not take the photograph. This witness was not  
13 present for the photograph being taken. The only thing this  
14 witness has testified to that is he's aware that it's the  
15 general policy of DOC to take photographs of everyone involved  
16 in use of force. That's not a sufficient foundation for which  
17 to introduce this document into evidence.

18 THE COURT: Thank you.

19 I agree at this point a sufficient foundation hasn't  
20 been laid. If you'd like to ask additional questions, you may.  
21 Fundamentally, the witness has said that he can read things  
22 from the document and that he recognizes the thing that he's  
23 shown on it. He hasn't testified regarding having ever seen  
24 this document before, having any basis for how it was that this  
25 document was produced.

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Mitchell - Redirect

1           So at this point I haven't heard a sufficient  
2 foundation. If you'd like to inquire further, you're welcome  
3 to do so.

4           MR. LICHTMACHER: I have to object to your ruling,  
5 your Honor. I think that it's classic foundation pursuant  
6 to -- I forgot what the rule is. Forgive me, that's my  
7 mistake. 902 maybe, I don't remember. But I can't see what  
8 additional information can be provided. I can ask him whether  
9 or not that's the way McCurdy looked on that date, you know,  
10 but other than that --

11          THE COURT: Thank you.

12          MR. LICHTMACHER: -- if he never saw the document.  
13 And in terms of it not being -- when the document was provided  
14 to us, it looked like that. It wasn't provided by me. It was  
15 provided by them to me.

16          THE COURT: Understood. I invite you to ask the  
17 questions that you think might be sufficient to lay a  
18 foundation. I'm ruling based on the information that's been  
19 proffered to date, which is that he's generally aware that  
20 photos of this type are taken and he read things from the  
21 exhibit and agreed that it's stated certain things. That in  
22 and of itself is inadequate to lay a foundation.

23          Again, whether there are additional questions that  
24 you'd like to ask is up to you. I'm not going to tell you what  
25 questions to ask to make a proper foundation.

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Mitchell - Redirect

1 MR. LICHTMACHER: I wasn't asking a legal advice. I  
2 was just a little shocked by your ruling. And note my  
3 objection.

4 One more thing. Can I use his document if they're  
5 objecting to the fact that mine doesn't look correct? They  
6 were provided by them.

7 MR. SIDDIQI: I have no problem giving this to  
8 Mr. Lichtmacher if this was ultimately to be admitted into  
9 evidence.

10 THE COURT: To the extent there is an issue regarding  
11 the coloring of the document --

12 MR. LICHTMACHER: No problem. Let's switch.

13 THE COURT: -- I can see. I'm happy for you to use  
14 the other version of the image. Again, my ruling is based on  
15 the questioning to date, and I am not foreclosing further  
16 questioning that might be effective to lay a foundation  
17 regarding the accuracy of the image that's shown on this  
18 exhibit. Good.

19 MR. SIDDIQI: Thank you, Judge.

20 (Continued on next page)

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Mitchell - Redirect

1 (In open court)

2 BY MR. LICHTMACHER:

3 Q. Is that the way Chance McCurdy looked on February 19, 2015?

4 A. Yes.

5 Q. It's the way he looked on that day, correct?

6 A. I guess so. Date on that picture --

7 THE COURT: That's not the question.

8 Q. No, you saw him.

9 THE COURT: I'm sorry. Counsel, can you please  
10 rephrase the question?

11 Let me ask the witness to please listen to the  
12 question and respond to it.

13 Please repeat, Counsel.

14 Q. Pretty clear you saw Chance McCurdy on February 19, 2015,  
15 correct?

16 MR. SIDDIQI: Objection.

17 THE COURT: Thank you.

18 You can answer that question.

19 A. Yes.

20 Q. And you got a good look at him. You were involved in an  
21 incident with him, correct?

22 A. Yes.

23 Q. Is that the way he looked on that day?

24 MR. SIDDIQI: Objection.

25 THE COURT: Thank you.

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Mitchell - Redirect

1 Counsel, can I ask you to please reframe the question?

2 Q. When you saw him, did he look the way he looks in this  
3 photo?

4 MR. SIDDIQI: Objection.

5 A. No.

6 THE COURT: OK. Thank you.

7 You can answer the question.

8 A. No.

9 Q. In what way is it different?

10 A. I didn't see him looking like this. I don't know -- I --

11 THE COURT: Thank you.

12 I understand the witness has testified that it does  
13 not reflect what he saw.

14 You can proceed, Counsel.

15 Q. Was the hair on his face the same way that day as it is in  
16 this photo?

17 MR. SIDDIQI: Objection.

18 THE COURT: Thank you.

19 You can answer the question.

20 A. I didn't get a look at his hair.

21 Q. Do you know if he had a beard?

22 A. Yes.

23 Q. You got a direct look at his face, right?

24 A. Yes.

25 Q. In fact, you punched him in his face at some point?



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Mitchell - Redirect

1 A. Yes.

2 Q. And you don't know how many times though, correct?

3 A. Correct.

4 Q. There seems to be an item underneath Mr. McCurdy. Do you  
5 recognize what that is?

6 MR. SIDDIQI: Objection, your Honor.

7 THE COURT: Thank you.

8 Sustained.

9 Q. Do you know who Captain Saint-Fleur is?

10 A. Yes.

11 Q. Who is Captain Saint-Fleur?

12 MR. SIDDIQI: Objection.

13 THE COURT: Thank you.

14 You can answer the question.

15 A. A captain assigned to AMCK.

16 Q. What are some of the assignments that he does regarding an  
17 incident involving the use of force?

18 MR. SIDDIQI: Objection.

19 THE COURT: Thank you.

20 Can I ask you to rephrase the question, please,  
21 Counsel?

22 MR. LICHTMACHER: Sure.

23 Q. Is he the person who takes -- one of the people who take  
24 photos after use of force?

25 MR. SIDDIQI: Objection, your Honor. Ask for a

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Mitchell - Redirect

1 sidebar.

2 THE COURT: Thank you.

3 Counsel, I'm going to sustain the objection. Please  
4 proceed.

5 MR. LICHTMACHER: Can we do a sidebar, your Honor?

6 THE COURT: Yes. Please come on up.

7 (Continued on next page)

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J94Qmcc4

Mitchell - Redirect

1 (At the side bar)

2 THE COURT: Please proceed.

3 First let me note for the record that the witness has  
4 testified that he cannot identify that this is the way that the  
5 person appeared on the date, which underscores the conclusion I  
6 reached previously, that counsel had not laid a foundation for  
7 the introduction of the exhibit.

8 Please proceed, Counsel.

9 MR. LICHTMACHER: Well, he did identify him as Chance  
10 McCurdy immediately. He did do that. So obviously he knew  
11 enough about the way he looked.

12 THE COURT: Thank you.

13 Counsel, you can proceed. There is no basis for the  
14 record for any conclusion that this witness saw Mr. McCurdy  
15 with that state of injuries in that condition. He's testified  
16 that he didn't. So we should move on.

17 MS. GOYKADOSH: Your Honor, can I say one very quick  
18 thing? The reason why we were objecting before is we were just  
19 concerned that the questioning is getting very close to the  
20 fact that there was a use of force investigation. Your Honor  
21 already ruled that there is to be no testimony or argument  
22 about the use of force investigation, at the final pretrial  
23 conference.

24 THE COURT: Thank you. The parties agreed that there  
25 would not be.

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1 MR. LICHTMACHER: Yeah, I'm not going into it, your  
2 Honor.

3 MS. GOYKADOSH: Understood. I just wanted to clear  
4 that up.

5 MR. LICHTMACHER: It was just the way he qualified  
6 that that was the witness was there taking the photo, your  
7 Honor.

8 THE COURT: If that was the witness that you could  
9 have called to authenticate it --

10 MR. LICHTMACHER: Or Chance McCurdy.

11 THE COURT: Or Chance McCurdy. I understand you're  
12 trying to work around that problem.

13 MR. LICHTMACHER: I would say so, your Honor. I  
14 thought I did it effectively. Apparently, you have the last  
15 word, so...

16 THE COURT: Thank you.  
17 Anything else we need to talk about here?

18 MS. GOYKADOSH: No, your Honor.

19 MR. SIDDIQI: No, your Honor.

20 MR. LICHTMACHER: There is a document number 15, as  
21 long as we're here, which is the clinic records which are kept  
22 in the regular course of business and indicate what his  
23 injuries are, and has a diagram of his injuries.

24 THE COURT: Thank you. What's the question?

25 MR. LICHTMACHER: The question is in terms of getting

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Mitchell - Redirect

1 this in without my absentee client at the moment.

2 THE COURT: Thank you.

3 MR. LICHTMACHER: Now, if the Court deems this an  
4 impossibility, I won't waste the jury and your time.

5 THE COURT: Thank you. The question presented is how  
6 this would be authenticated?

7 MR. LICHTMACHER: No, no, I wouldn't presume to ask  
8 the Court for legal advice. I understand that's not  
9 acceptable. What I'm asking is if there's no possible way for  
10 me to get it in, I don't want to waste your time or the jury's  
11 time.

12 THE COURT: Thank you. The question is how it would  
13 be authenticated?

14 MR. LICHTMACHER: You're asking me. OK.

15 THE COURT: Yes.

16 MR. LICHTMACHER: How it would be authenticated. I'm  
17 sorry, I misunderstood. Forgive me.

18 THE COURT: That's fine.

19 MR. LICHTMACHER: It's not a relaxing day, your Honor.  
20 So really the issue becomes there's a clinic. He knows there's  
21 a clinic. You know, there's department of corrections insignia  
22 all over it. There's Chance McCurdy's name. And it's right  
23 after the incident. It's also provided by defendants. I would  
24 like to offer it into evidence.

25 THE COURT: Thank you. You can ask the witness

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Mitchell - Redirect

1 questions in order to attempt to authenticate it through him.  
2 The question will be what his responses are. So if he  
3 testifies that he has no knowledge of the document and has no  
4 basis to testify as to its authenticity --

5 MR. LICHTMACHER: The particular document, you're  
6 telling me?

7 THE COURT: That's correct.

8 MR. LICHTMACHER: I won't even bother.

9 THE COURT: Thank you. It's up to you. Let's  
10 proceed.

11 (Continued on next page)  
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Mitchell - Redirect

1 (In open court)

2 THE COURT: Thank you, Counsel. I apologize for the  
3 interruption. Please proceed.

4 BY MR. LICHTMACHER:

5 Q. Are there cameras in the hallway of the -- where you've  
6 been shown a photo of the -- I forgot what you called it,  
7 forgive me -- of the tier that Mr. McCurdy was on? Are there  
8 cameras in that hallway?

9 MR. SIDDIQI: Objection.

10 THE COURT: Thank you.

11 You can answer the question.

12 A. Yes.

13 Q. And, in fact, are those cameras are capable of taking  
14 pictures as inmates walk places? For instance, to the clinic,  
15 correct?

16 MR. SIDDIQI: Objection. Beyond the scope.

17 THE COURT: Thank you.

18 You can answer the question.

19 A. Yes.

20 Q. In fact, you know several of the officers who work at AMCK  
21 by virtue of the fact that you've worked at AMCK for so many  
22 years now, correct?

23 A. Correct.

24 MR. LICHTMACHER: Your Honor, I want to approach the  
25 witness.

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1 THE COURT: Thank you. You may.

2 MR. LICHTMACHER: This is Plaintiff's 13.

3 Q. Before you is a document marked for identification as  
4 Plaintiff's 13. Do you recognize the area depicted in that  
5 photo?

6 A. Looks like the corridor of AMCK.

7 Q. And it's the same corridor that you were shown photographs  
8 of earlier by counsel, correct?

9 A. No.

10 Q. It's a different corridor?

11 A. Yes.

12 Q. Where is this corridor?

13 A. Not -- I believe it's right outside -- it's outside of the  
14 housing area.

15 Q. OK. It's in AMCK, correct?

16 A. Yes.

17 Q. And do you recognize any of the people in the photo?

18 A. No, just inmate McCurdy.

19 Q. Just inmate McCurdy. Is that the way he looked on  
20 February 19, 2015?

21 MR. SIDDIQI: Objection.

22 THE COURT: Thank you.

23 I'm sorry, can you ask the witness, have you seen this  
24 photograph before, Mr. Mitchell?

25 THE WITNESS: I'm not too familiar with this



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Mitchell - Redirect

1 photograph, no.

2 THE COURT: Thank you.

3 Q. Have you ever seen this photograph before?

4 A. I don't believe so, no.

5 Q. It wasn't shown to you at any point, say, in preparation  
6 for trial?

7 A. No.

8 Q. Now, at some point in time did you become aware that  
9 McCurdy was injured?

10 A. Yes.

11 Q. When did you become aware of that?

12 A. After I came back from the hospital.

13 Q. After you came back from the hospital, correct?

14 A. Right.

15 Q. So, by the 4th when you generated Plaintiff's 2, you were  
16 aware that McCurdy had been injured, correct?

17 A. Correct.

18 Q. And you didn't date your release for medical records, so we  
19 don't really know what date you signed -- you generated that  
20 document, do we?

21 MR. SIDDIQI: Objection.

22 THE COURT: Thank you.

23 Can you please rephrase the question?

24 MR. LICHTMACHER: Sure.

25 Q. There's no date -- there's no signature and a date next to

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Mitchell - Redirect

1 the signature on the document Defendant's L, the one that is  
2 your release for medical records, is there?

3 A. No, there is no date.

4 Q. There is no date on it. And, in fact, there's no way to  
5 tell if that document wasn't generated until you already knew  
6 that McCurdy was hurt, is there?

7 MR. SIDDIQI: Objection.

8 THE COURT: Thank you.

9 Can I ask you to rephrase the question, counsel?

10 MR. LICHTMACHER: Sure.

11 Q. Other than your testimony, and here's the document again,  
12 Exhibit L, document without the signature and without the date  
13 at the bottom and the limited release of health information.  
14 Without the date on it, we have no way of knowing, other than  
15 your testimony, when this document was actually generated, do  
16 we?

17 MR. SIDDIQI: Objection.

18 THE COURT: Thank you.

19 You can answer the question.

20 A. No.

21 Q. And did you ever sign a document for the release of health  
22 information to provide it to workers' comp. people?

23 MR. SIDDIQI: Objection.

24 THE COURT: Thank you.

25 You can answer the question.

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Mitchell - Redirect

1 A. I don't recall.

2 Q. Well, did you get a response from workers' comp.?

3 MR. SIDDIQI: Objection.

4 THE COURT: Thank you.

5 You can answer the question.

6 A. Like I said, it didn't go anywhere. It could have been  
7 because I filled the form out wrong.

8 Q. Well, did you ever get -- I asked you something different.  
9 I didn't ask you whether you obtained workers' comp., at least  
10 not now. I'm asking, did you ever get a response? Like did  
11 they ever send a letter and say, hey, you forgot to sign the  
12 form?

13 A. Yes, they said I was missing -- it was incomplete. The  
14 package was incomplete.

15 Q. And did they tell you why the package was incomplete?

16 A. No, I didn't inquire any further.

17 Q. You didn't inquire any further. So you didn't then sign  
18 the document, date it, and send it to them?

19 A. No.

20 Q. So, once again we have no way of knowing -- well,  
21 withdrawn.

22 So does that mean at no point in time did you sign the  
23 release for your health information to workers' comp.?

24 MR. SIDDIQI: Objection.

25 THE COURT: Thank you.

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1           You can answer the question.

2       A.   To the best of my knowledge, no.

3       Q.   Was that because you didn't want them to know that you  
4       really didn't have an eye injury?

5           MR. SIDDIQI:  Objection.

6           THE COURT:  Thank you.  Sustained.

7       Q.   Was that because you didn't want them to know you really  
8       didn't have a facial injury?

9           MR. SIDDIQI:  Objection.

10          THE COURT:  Thank you.  Sustained.

11       Q.   Now, you indicated that the job of corrections was care,  
12       custody and control, correct?

13       A.   Correct.

14       Q.   But punishment -- not to be facetious, punishment is not  
15       part of your job, correct?

16          MR. SIDDIQI:  Objection.

17          THE COURT:  Thank you.  Sustained.

18       Q.   Well, nowhere are you allowed to make decisions that an  
19       inmate needs to have some kind of unsolicited force used  
20       against him for any reason, are you?

21          MR. SIDDIQI:  Objection.

22          THE COURT:  Thank you.

23           You can answer the question.

24       A.   Can you repeat the question?

25       Q.   Sure.  Nowhere is it indicated in the policies, you know,

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1 that you testified about that you're allowed to use force for a  
2 reason other than to defend yourself, are you, or somebody  
3 else?

4 A. Correct.

5 Q. Now, was McCurdy in possession of contraband that day?

6 A. The strip search wasn't fully completed, so I'm not sure of  
7 that.

8 Q. Well, you were never informed like, "hey, we got the knife,  
9 he's got it"?

10 MR. SIDDIQI: Objection.

11 THE COURT: Thank you. Sustained.

12 Q. Were informed whether in fact McCurdy did have contraband  
13 that day?

14 MR. SIDDIQI: Objection.

15 THE COURT: Thank you.

16 You can answer the question.

17 A. No, I was never informed.

18 Q. So you were never informed that he had a scalpel, correct,  
19 on that day?

20 A. No, I was not informed.

21 Q. You were never informed that he had a razor on that day,  
22 correct?

23 A. No, I was not informed.

24 Q. And you were never informed that he had any weapon of any  
25 type on that date, were you?

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1 A. No, I was not informed.

2 Q. And you didn't see any knife, weapon or contraband on  
3 McCurdy's person during the incident with McCurdy on that date,  
4 did you?

5 A. No, I didn't.

6 Q. So, in fact, he didn't produce anything to cut you with, as  
7 you said he threatened to, correct?

8 A. Correct.

9 Q. He never showed you any cutting instruments, correct?

10 A. No, he didn't show me anything.

11 Q. And, in fact, you have no knowledge that McCurdy was  
12 involved in the slashing that occurred by the commissary, do  
13 you?

14 A. He was present inside the commissary.

15 Q. You have no knowledge that McCurdy was involved in the  
16 slashing on that date, do you?

17 MR. SIDDIQI: Objection.

18 THE COURT: Thank you.

19 You can answer the question.

20 A. I also have no knowledge of him not being basically  
21 involved in that.

22 Q. Well, do you assume because there's no knowledge he wasn't  
23 involved that he was involved?

24 A. He was --

25 MR. SIDDIQI: Objection.

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1 THE COURT: I'm sorry. Can you rephrase the question?

2 MR. LICHTMACHER: Sure.

3 Q. You have no reason as you sit here today to think that  
4 McCurdy was the slasher on that day, do you?

5 A. Can you repeat that question?

6 Q. Sure. As you sit here today, do you believe McCurdy was  
7 the slasher in the commissary?

8 MR. SIDDIQI: Objection.

9 THE COURT: Thank you.

10 You can answer the question.

11 A. It's very possible.

12 Q. Well, no weapons found. You already said that, correct?

13 THE COURT: Thank you. Sustained.

14 Q. So why would you think it's possible that the McCurdy was  
15 the slasher?

16 MR. SIDDIQI: Objection.

17 THE COURT: Thank you. Sustained.

18 Q. How did you form the conclusion that it's possible that he  
19 he's the slasher?

20 MR. SIDDIQI: Objection.

21 THE COURT: Thank you. Sustained.

22 Q. Did you ever hear of McCurdy in any way being disciplined  
23 for doing a slashing on that day?

24 MR. SIDDIQI: Objection.

25 THE COURT: Thank you. Sustained.

J94Qmcc4

Mitchell - Recross

1 Q. Is it fair to say there is not a single soft landing area  
2 in that cell?

3 A. Yes.

4 MR. LICHTMACHER: Give me half a second, your Honor.

5 THE COURT: Thank you. That's fine.

6 (Pause)

7 Q. Can corrections officers write tickets to inmates?

8 MR. SIDDIQI: Objection.

9 THE COURT: Thank you. Sustained.

10 Q. To your knowledge, did McCurdy get a ticket for  
11 participating in a slashing that day?

12 MR. SIDDIQI: Objection.

13 THE COURT: Thank you. Sustained.

14 MR. LICHTMACHER: No more questions, your Honor.

15 THE COURT: Thank you.

16 Counsel for defendants

17 MR. SIDDIQI: Yes, your Honor, short redirect.

18 RECROSS EXAMINATION

19 BY MR. SIDDIQI:

20 Q. Officer Mitchell, I'd like to show you what's already been  
21 entered into evidence as Defendant's Exhibit M. If it can be  
22 published to the jury. Officer Mitchell, is this what your  
23 face normally looks like?

24 A. No.

25 MR. LICHTMACHER: Objection, your Honor.



J94Qmcc4

Mitchell - Recross

1 THE COURT: I'm sorry, can you please rephrase the  
2 question, Counsel?

3 Q. Officer Mitchell, do you recognize yourself in that  
4 photograph?

5 A. Yes.

6 MR. LICHTMACHER: Objection, your Honor. Exceeds the  
7 scope of cross.

8 THE COURT: Thank you.

9 Counsel, I'm going to sustain the objection.

10 Q. Officer Mitchell, do you see an injury to your phase in  
11 this photograph?

12 MR. LICHTMACHER: Objection, your Honor.

13 THE COURT: Thank you. Sustained.

14 Q. I'd like to also show you what's already been entered into  
15 evidence as Plaintiff's Exhibit I, if it can please be shown to  
16 the --

17 MR. LICHTMACHER: Defendant's Exhibit.

18 Q. Plaintiff's Exhibit 1, I'm sorry. This is the employee  
19 claim.

20 Officer Mitchell, can you read the title of the  
21 document there, please?

22 A. The title Employee Claim.

23 Q. And is there a notation on the top right of the document?

24 A. C-3.

25 Q. And do you see an insignia on the top left of the document?

J94Qmcc4

Mitchell - Recross

1 A. Yes.

2 Q. And on the second page of that document, do you see the  
3 date that you signed that document?

4 A. Yes.

5 Q. What date is that?

6 A. 2/20/15.

7 Q. I'd also like to show you what's been entered into evidence  
8 as Defendant's Exhibit L and also have it shown to the jury.  
9 Do you see this title on the document?

10 A. Yes.

11 Q. What's that title?

12 A. C-3.3.

13 Q. Is that insignia the same as the one that was on  
14 Plaintiff's Exhibit 1?

15 A. Yes.

16 Q. Is this part of the set of documents you executed as part  
17 of Plaintiff's Exhibit 1?

18 MR. LICHTMACHER: Objection. It's been asked and  
19 answered.

20 THE COURT: I'm sorry. Counsel, you can ask the  
21 question, and I'll listen to an answer. Counsel, please  
22 proceed.

23 Q. Is this part of the same set of documents as Plaintiff's  
24 Exhibit 1?

25 THE COURT: Can I ask you, Counsel, to reframe the

J94Qmcc4

Mitchell - Recross

1 question?

2 Q. Is C-3.3 part of the document C-3?

3 A. Yes.

4 Q. Did you execute this document the same time as you executed  
5 the employee claim?

6 A. Yes.

7 Q. And that was February 20, 2015?

8 A. Yes.

9 Q. Officer Mitchell, besides the slashing that occurred on  
10 February 19, 2015, have you ever dealt with any other slashing?

11 MR. LICHTMACHER: Objection, your Honor.

12 THE COURT: Thank you. Sustained.

13 Q. Officer Mitchell, what did the plaintiff say to you  
14 immediately before punching you?

15 MR. LICHTMACHER: Objection. Asked and answered.

16 THE COURT: Thank you.

17 I'll permit it.

18 A. He said he's going to cut one of us.

19 MR. SIDDIQI: I have no further questions, your Honor.

20 THE COURT: Thank you.

21 Counsel for plaintiff, any additional questions for  
22 this witness?

23 MR. LICHTMACHER: Just two.

24 THE COURT: Thank you. Please proceed.

J94Qmcc4

Mitchell - Recross

1 REDIRECT EXAMINATION

2 BY MR. LICHTMACHER:

3 Q. He didn't cut you, did he?

4 A. No, he didn't cut me.

5 Q. And he didn't show you a knife, did he?

6 A. No.

7 Q. In fact, according to you, he punched you, correct?

8 A. Correct.

9 Q. Now, this is Plaintiff's 2, and it's got a clear date on it  
10 of March 4. Not February 19 or February 20. Isn't that  
11 correct?

12 MR. SIDDIQI: Objection.

13 THE COURT: Thank you.

14 You can answer the question.

15 A. Correct.

16 MR. LICHTMACHER: I have no more questions.

17 THE COURT: Thank you.

18 Counsel for defendants?

19 MR. SIDDIQI: Yes, one quick question.

20 RECROSS EXAMINATION

21 BY MR. SIDDIQI:

22 Q. I'd like to show you Plaintiff's Exhibit 2 again. Can it  
23 please be shown to the jury?

24 Officer Mitchell, do you see at the top of this  
25 document it says date of statement?

J94Qmcc4

Mitchell - Recross

1 A. Yes.

2 Q. And what's it say is the date of the statement?

3 A. 2/20/2015.

4 MR. SIDDIQI: Thank you. No further questions.

5 THE COURT: Thank you.

6 Counsel?

7 MR. LICHTMACHER: Nothing, your Honor.

8 THE COURT: Good. Thank you.

9 Thank you very much, Officer Mitchell, for your  
10 testimony. You can step down.

11 (Witness excused)

12 THE COURT: Counsel for plaintiff, please call your  
13 next witness.

14 MR. LICHTMACHER: Can we have a two-minute  
15 intermission?

16 THE COURT: Thank you. Yes. We can take a very short  
17 recess.

18 So, ladies and gentlemen of the jury, we're going to  
19 take a very short five minute or so break just to let everyone  
20 stretch their legs.

21 So during this break, please don't discuss the case  
22 amongst yourselves. Don't do any research about the case, and  
23 don't speak to anyone else about the case. Thank you. I'll  
24 see you back here in a few moments.

25 (Continued on next page)

J94Qmcc4

Mitchell - Recross

1 (Jury not present)

2 THE COURT: Thank you. You can be seated. Good.

3 Let's take a very short rest break. Counsel, please be back in  
4 no more than five minutes. I will be back then. I expect that  
5 we will then hear from Captain Bell. Is that correct, counsel  
6 for plaintiff?

7 MR. LICHTMACHER: I guess so, your Honor. Yes.

8 That's a yes, your Honor.

9 THE COURT: Good. So I'll see you back here in about  
10 five minutes. Thank you very much.

11 (Recess)

12 (Continued on next page)

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J941mcc5

1 (In open court; jury not present)

2 THE COURT: Thank you. You can be seated.

3 So I'm back on the record. It's been about ten  
4 minutes since I left. Mr. Lichtmacher is not back in the room.  
5 My clerk has gone out to look for him, but he is not in the  
6 hall. She has not searched for him elsewhere. I will give him  
7 a couple of additional minutes and then we will get started,  
8 bring in the jury, and Mr. Lichtmacher will have the pleasure  
9 of coming in with the jury waiting for him.

10 MS. GOYKADOSH: Your Honor, I'm so sorry. I know  
11 Mr. Lichtmacher is not here and that we might be bringing in  
12 the jury before him coming back, but I do have some things that  
13 I want to raise, so I'm not sure what to do at this point.

14 THE COURT: Thank you. I won't take up any  
15 substantive issues until Mr. Lichtmacher is in the courtroom.

16 MS. GOYKADOSH: Thank you, your Honor.

17 THE COURT: Can I ask if a male member of the defense  
18 team could see if Mr. Lichtmacher is available, if he's in the  
19 restroom.

20 Oh, good. Thank you. Good. So Mr. Lichtmacher is  
21 joining us.

22 Counsel for defendants, there's a point that you  
23 wished to raise before bringing the jury back in?

24 MS. GOYKADOSH: Yes. They're all related to  
25 Mr. McCurdy's absence.

J941mcc5

1           So again, our Rule 41(b) application, another  
2       prejudice is that --

3           THE COURT: Counsel, to be very clear, I'm going to  
4       end the trial day at 3:30.

5           MS. GOYKADOSH: Okay.

6           THE COURT: So if you want to spend time talking about  
7       legal issues rather than letting the witnesses that the  
8       plaintiff has be examined, I'm happy to do that. So I invite  
9       you to use the time as you like.

10          Counsel, please proceed. What would you like to  
11       discuss?

12          MS. GOYKADOSH: Yes. So with regards to --

13          THE COURT: And again, to be very clear, that means  
14       that if plaintiff hasn't rested at the end of the day because  
15       his witnesses have not finished their testimony, then he will  
16       rest tomorrow when Mr. McCurdy may reappear.

17          So counsel for defendants, please, again, I invite you  
18       to take up this time however you think is best for your  
19       strategic purposes.

20          MS. GOYKADOSH: Thank you, your Honor. I will sit  
21       down now.

22          THE COURT: Thank you. It's your choice. I'm happy  
23       to engage in a discussion of whatever issues you like.

24          MS. GOYKADOSH: I understand. Thank you.

25          THE COURT: Thank you.



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1 I understand that the parties wish to proceed with the  
2 trial.

3 Ms. Nelson, would you please bring in the jury.

4 I should note briefly for the record that I have  
5 received more communications from the Marshals Service who have  
6 confirmed, in substance, that Mr. McCurdy did get the  
7 communication that we sent back before he decided to be  
8 returned to Rikers. I'll give you a more complete statement  
9 regarding the interactions with the Marshals, but I just wanted  
10 to confirm that my current information is that he was advised  
11 of the substance of the prior communication.

12 The jury can enter.

13 (Continued on next page)  
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(Jury present)

THE COURT: Thank you. You can be seated.

Counsel for plaintiff, would you please call your next witness.

MR. LICHTMACHER: Well, first, your Honor, I'd like to enter into evidence, offer into evidence Plaintiff's 8, the certified medical records from Elmhurst from the 2/19/15 incident.

MS. GOYKADOSH: We object, your Honor.

THE COURT: Thank you. Please come on up.

(Continued on next page)

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(At the sidebar)

THE COURT: Sorry. There's an objection? What's the basis?

MS. GOYKADOSH: The objection is that there's been absolutely no foundation.

THE COURT: Thank you. That's what the certification is for, is it not?

MS. GOYKADOSH: Well, there needs to be relevance questions asked that say: Whose medical records are these? Are these plaintiff's? Who are these medical records going to be introduced through is my question. There needs to be a witness through whom this evidence is introduced. Are they just being handed to the jury for the jury just to rifle through? I do believe that there needs to be a foundation laid with testimony. I think your Honor said that actually at the final pretrial conference. We're not disputing the authenticity of these records. We are saying that there needs to be a proper foundation laid.

THE COURT: Thank you.

Why is the certification provided by Elmhurst not proper authentication under Rule 902? Give me a moment.

MS. GOYKADOSH: Your Honor --

THE COURT: Good. Please go on.

MS. GOYKADOSH: I'm not making a Rule 902 objection. I'm making a Rule 402 and a Rule 403 objection. I do not

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1 believe that there has been proper foundation laid through the  
2 testimony of a witness that would allow these medical records  
3 to just be admitted to the jury.

4 THE COURT: Thank you.

5 That's because you believe it's not relevant to the  
6 claims at trial?

7 MS. GOYKADOSH: I do believe that it's relevant, but  
8 there hasn't been any relevant testimony yet given which would  
9 lay the necessary foundation for the introduction of these  
10 records.

11 THE COURT: Thank you.

12 What are you looking for?

13 MS. GOYKADOSH: Well, there hasn't -- so the officers  
14 gave testimony, but there hasn't been any testimony that has  
15 been given that would support the conclusions that are in these  
16 records.

17 THE COURT: Thank you.

18 What do you mean by the conclusions that are in these  
19 records? These are self-authenticating business records that  
20 fall under 803(6). It's not apparent what you're referring to.

21 MS. GOYKADOSH: To give an example, to go to the  
22 cortical step-off issue, it says it may suggest evidence of a  
23 fracture, but there has been no testimony by anybody about  
24 anything that happened with plaintiff's hands that could have  
25 suggested a fracture. That's one example.

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1 THE COURT: Thank you.

2 So I understand that the objection is not one under  
3 803(6); I understand that it's not one under 902. Instead, I  
4 understand that the argument to be that this document cannot be  
5 introduced because there is no relevance of medical information  
6 regarding the injuries sustained. It's not apparent to me what  
7 the basis is for the argument. If you'd like to provide  
8 additional argument, I'd appreciate that.

9 MS. GOYKADOSH: I would. Thank you, your Honor.

10 Just to be clear, 402 is one argument. 403 is my  
11 second argument. And I think it's extremely confusing for the  
12 jury to just be handed a stack of medical records. As your  
13 Honor has mentioned, argument by counsel is not evidence. I do  
14 not know who the person is going to be who these medical  
15 records are going to be introduced through. It's confusing.

16 THE COURT: I'm sorry. You're confusing several  
17 issues. There will be no person who will introduce them.  
18 Instead, counsel is seeking to introduce them as authenticated  
19 records by virtue of the certification, so that's what the  
20 certification is for. So can you please pull apart your  
21 arguments.

22 So first, I understand that you're not making an  
23 argument that these have not been properly certified and that  
24 they are not properly authenticated under Rule 902. You said  
25 that you're not making an argument that they are improper

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1 hearsay statements that should be not admitted under 803(6).

2 So what, counsel, is the basis for the objection?

3 MS. GOYKADOSH: Just one moment, your Honor.

4 (Defense counsel conferring)

5 MS. GOYKADOSH: Just to step back for a second, if  
6 your Honor were to admit these records, it would be extremely  
7 problematic, because Officer Mitchell obviously can't testify  
8 about them, Captain Bell cannot testify about them, so there  
9 would be nobody to talk about what is in these records. So I  
10 think this gets back to our Rule 403 concerns. It's confusing  
11 for the jury. It's misleading to the jury. There is just  
12 absolutely nobody through whom these records can be properly  
13 introduced. Again, they are certified medical records so I do  
14 not have a Rule 902 objection. I do not have a Rule 803  
15 objection. However, there still needs to be a proper  
16 foundation laid through the testimony of a witness, and there  
17 is no witness here through whom that foundational testimony can  
18 be raised.

19 THE COURT: What do you mean by foundational testimony  
20 in the absence of a 902 objection?

21 MS. GOYKADOSH: So functionally what I'm saying -- and  
22 I think I misspoke earlier, but functionally what I'm saying is  
23 that there's no witness who can talk about these records. The  
24 only person who is going to talk about them is going to be  
25 Mr. Lichtmacher, and it's not evidence, as your Honor said,

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1 when Mr. Lichtmacher speaks. So again, I think this is going  
2 to be extremely confusing to the jury to have these records  
3 just admitted into evidence without any person there. Witness.  
4 I'm sorry.

5 THE COURT: Thank you.

6 The objection is overruled.

7 MR. LICHTMACHER: Your Honor, while I'm here, I would  
8 like to read a very small portion into the record, if it's  
9 being accepted into evidence.

10 THE COURT: Thank you. It will be accepted into  
11 evidence. The arguments proffered by counsel for defendants  
12 are infirm. These are records that are being introduced under  
13 803(6) and 902. Perforce, there is not a witness here to  
14 testify as to their content. Otherwise you would not need a  
15 hearsay exception and you would not need the  
16 self-authentication rule. So to the extent that the argument  
17 by counsel for defendants is, as it has been repeatedly stated,  
18 that one must have a witness who can testify to their content  
19 and to lay the foundation with respect to them, it is an infirm  
20 argument and I overrule the objection.

21 MS. GOYKADOSH: Just to note, it's a Rule 402 and  
22 Rule 403 objection.

23 THE COURT: Thank you. Sorry. To the extent this is  
24 a 402 objection -- counsel, you're wasting my time. What is  
25 your argument, that this is not relevant in this case?

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1 MS. GOYKADOSH: There hasn't been any relevant  
2 testimony yet. I understand your Honor's position and I --

3 THE COURT: No, counsel. What is the basis for the  
4 argument that evidence about the injuries in an excessive force  
5 trial are not relevant?

6 MS. GOYKADOSH: There hasn't been any testimony by  
7 plaintiff. It's my understanding there won't be any testimony  
8 by plaintiff. I am not going to be able to ask him about  
9 anything in those records.

10 THE COURT: Thank you.

11 So you didn't answer my question about the relevance.  
12 That's because it is a futile, wasting-of-my-time argument.  
13 It's clearly relevant.

14 With respect to the 403 -- and to the extent that you  
15 can recall, counsel, you have a duty of candor to the Court.  
16 If you wish to waste my time and all of our time raising  
17 arguments that have no foundation, that is your choice. But I  
18 do not appreciate it, nor does the jury.

19 MS. GOYKADOSH: I apologize to the Court.

20 THE COURT: Thank you.

21 With respect to the 403 argument, to the extent that I  
22 understand it, it is that because no witness has been called to  
23 speak to these papers, counsel is concerned that they will not  
24 be able to interrogate the speaker. That is not unduly  
25 prejudicial. Again, counsel on both sides have chosen not to



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1 call the physicians who were involved in the preparation of  
2 these records. That was a strategic choice by you, counsel,  
3 and the consequences of it fall upon you. I don't find it to  
4 be unduly prejudicial.

5 MS. GOYKADOSH: I don't want to waste the Court's  
6 time. I just want to reiterate I believe it's confusing, but  
7 that's all I want to say, just to make my record.

8 THE COURT: Thank you.

9 No more confusing at this point than it has been  
10 throughout.

11 Counsel, you've discussed the elements of this that  
12 would be confusing. That generated our decision to redact  
13 certain portions of it. And now you're taking the position  
14 that the entirety of it should be excluded because it's  
15 confusing. This is the first time that you've made that  
16 argument. And so counsel, again, if your argument had been to  
17 take out the entire thing because it's confusing, that would  
18 have come up earlier and we would not have engaged in an  
19 exercise to redact specific elements of it, and you would have  
20 raised that in your letter to the Court requesting not  
21 redactions to this record but its exclusion in its entirety.  
22 So again, counsel, please, I appreciate that you've raised this  
23 objection. I overrule it, and I'm going to accept it into  
24 evidence.

25 MS. GOYKADOSH: Thank you, your Honor.

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1 MR. LICHTMACHER: And I don't know if you heard me. I  
2 would like to read just a few very small sections of this into  
3 the record.

4 THE COURT: Thank you. Once it comes into evidence,  
5 you can read from it.

6 MR. SIDDIQI: And your Honor, I am very, very sorry to  
7 keep taking time on this. I am asking a functional question.  
8 At this point in time how is this exhibit going to be used?  
9 Mr. Lichtmacher will be allowed to read portions into evidence  
10 and we will be allowed to read other portions into evidence?

11 THE COURT: Yes.

12 MR. SIDDIQI: Okay.

13 THE COURT: It's all in evidence, and once it's in  
14 evidence, people can read it.

15 MR. SIDDIQI: Read it to the jury without a witness on  
16 the stand.

17 THE COURT: Correct.

18 MR. SIDDIQI: Thank you, your Honor.

19 (Continued on next page)  
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(In open court)

THE COURT: I'm sorry for the interruption.

I'm accepting Plaintiff's Exhibit 8 into evidence.

(Plaintiff's Exhibit 8 received in evidence)

THE COURT: Counsel, you can proceed.

MR. LICHTMACHER: Very briefly, I'm going to read a few small excerpts from this. This is from the medical records, Plaintiff's 8.

This is page 739. "Chief Complaints. Patient referred from Rikers for status post assault. Patient complained of head, neck, back, face, positive loss of consciousness. Patient also complained of bilateral rib pain."

This is from page 742. Says: "This is a 25-year-old male with no reported medical history brought in from Rikers presenting after alleged assault by prison guards in which he reports loss of consciousness for approximately five minutes. States he was hit in the head, neck, ribs, and right arm and leg. His pain is most significant in head, neck, and right arm. He denies new numbness, weakness, or tingling, though he had chronic neuropathy of right arm."

And then moving along, couple more sections.

"Lacerations, no palpable bony deformities of skull or facial bones."

And, "Pain with palpation of right superior to orbital bones."

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Bell - Direct

1 "Diagnosis." This is page 744. "Body side right  
2 indication decreased range of motion, right. Transport method:  
3 Stretcher."

4 "Arm pain. Transport method: Stretcher."

5 And performed by -- "Scheduled exam to be performed by  
6 radiology."

7 Next indication is, "Head pain. Dorsal."

8 This is page 746. "Chest Diagnosis. PA and lateral.  
9 Indication: Blunt trauma. Transport method: Stretcher."

10 And these will be available to the jury so they can  
11 review the whole thing.

12 THE COURT: Thank you.

13 MS. GOYKADOSH: Your Honor, now that this exhibit has  
14 been introduced into evidence, may I read some portions as  
15 well.

16 THE COURT: You may during your case in chief,  
17 counsel, which has not happened yet.

18 MS. GOYKADOSH: Thank you, your Honor.

19 MR. LICHTMACHER: Does the Court want to take custody  
20 of this?

21 THE COURT: Thank you. Please do hand it forward.

22 MR. LICHTMACHER: What's that?

23 THE COURT: Please do hand it forward.

24 MR. LICHTMACHER: Thank you.

25 THE COURT: Good. Thank you.

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Bell - Direct

1 Counsel for plaintiff, would you please call your next  
2 witness.

3 MR. LICHTMACHER: Yes. Plaintiff calls Cheryl Bell.

4 THE COURT: Thank you.

5 Captain Bell, would you please come forward.

6 (Witness sworn)

7 THE COURT: Thank you very much. Please be seated.

8 Please bring the chair close to the microphone, if you  
9 can.

10 Would you please state your full name and spell your  
11 last name for the record. Perhaps spell the entirety of your  
12 name for the record.

13 THE WITNESS: Cheryl Bell. C-H-E-R-Y-L, last name  
14 B-E-L-L.

15 THE COURT: Thank you.

16 Counsel, you can proceed.

17 MR. LICHTMACHER: Thank you, your Honor.

18 CHERYL BELL,

19 called as a witness by the Plaintiff,

20 having been duly sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY MR. LICHTMACHER:

23 Q. Captain Bell, were you employed on February 19th of 2015?

24 A. I was.

25 Q. By who?

J941mcc5

Bell - Direct

1 A. New York City Department of Corrections.

2 Q. And were you stationed in any specific building?

3 A. AMKC.

4 Q. In what?

5 A. I was in AMKC.

6 Q. And that's on Rikers Island, correct?

7 A. Yes.

8 Q. How long have you been with the Department of Corrections?

9 A. 20 years.

10 Q. 20 years? How long were you at AMKC?

11 A. I was at AMKC as an officer. When I got promoted, I came  
12 back to AMKC.

13 Q. When was that?

14 A. 2007.

15 Q. That's your promotion date or when you started at AMKC?

16 A. That's my promotion date.

17 Q. Okay. And have you been at AMKC fairly regularly since  
18 that date?

19 A. Right now I am assigned to the emergency service unit so I  
20 am not currently in AMKC.

21 Q. When was the last time you were assigned to AMKC?

22 A. Four years ago; three years ago, maybe.

23 Q. So you were there, as you said, during February 2015,  
24 correct?

25 A. I was.

J941mcc5

Bell - Direct

1 Q. How many officers, approximately, are -- in 2015, I'm  
2 talking about. Approximately how many officers, correction  
3 officers, were there on one shift at AMKC? Let's talk about  
4 the day shift.

5 A. 7 to 3 tour?

6 Q. Talking about 7 to 3.

7 A. The 7 to 3 tour can have anywhere from 300 officers, 200  
8 officers.

9 Q. 200 to 300?

10 A. Yeah.

11 Q. And how many captains? Again, we're talking about February  
12 2015.

13 A. AMKC is a huge facility, so you can have maybe 10 or 15  
14 captains, 20 captains, maybe.

15 Q. How many of the captains in February 2015 on the 7 to 3  
16 tour were females?

17 A. I have no idea.

18 Q. Were they mostly females, mostly males?

19 A. I have no idea.

20 Q. Would you say they're evenly distributed between men and  
21 women?

22 MS. GOYKADOSH: Objection.

23 THE COURT: Thank you.

24 You can answer the question.

25 A. I have no idea.

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Bell - Direct

1 Q. At any point in time did you notice that every captain at  
2 AMKC in February of 2015 was a female?

3 MS. GOYKADOSH: Objection.

4 THE COURT: Thank you.

5 You can answer the question.

6 A. Repeat your question?

7 Q. At any point in time in February of 2015 on the 7 to 3  
8 tour, did you notice that all the captains were females?

9 A. We never have all female captains.

10 Q. Okay. So there are usually a mix of men and women as  
11 captains, correct?

12 A. Usually, yes.

13 Q. And it goes up to -- if I understood you correctly, goes up  
14 to 20 captains in a building, correct?

15 A. It depends on the day and the tour.

16 Q. What's the control room?

17 A. Of what?

18 Q. AMKC. Does it have a control room?

19 A. You have a bunch of different control rooms in AMKC.

20 Q. And there are captains that work in those control rooms?

21 A. The main control room, there's a captain that works there.

22 Q. And any other control rooms the captains work?

23 A. No.

24 Q. The captains in the control room, does that captain respond  
25 to a use of force incident?



J941mcc5

Bell - Direct

1 A. No.

2 Q. Okay. Now under certain circumstances -- well, your  
3 promotion to captain, does that involve a civil service test?

4 A. Yes.

5 Q. Now when you get promoted -- by the way, does corrections  
6 have a rank of sergeant?

7 A. No.

8 Q. Rank of lieutenant?

9 A. No.

10 Q. So your rank is the rank above CO, correct?

11 A. Yes.

12 Q. And as a captain, you are able to supervise COs, is that  
13 correct?

14 A. Yes.

15 Q. In fact, are you aware of the last order rule?

16 A. Yes.

17 Q. What is the last order rule?

18 A. Officers have to follow their last order.

19 Q. And the last order would come from a superior officer,  
20 correct?

21 A. Yes.

22 Q. And so a captain or above, is that correct?

23 A. Yes.

24 Q. Now in use of force incidents, are captains usually on the  
25 scene to supervise?

J941mcc5

Bell - Direct

1 A. Yes.

2 Q. And that's a requirement, correct?

3 A. It doesn't always happen that way.

4 Q. I imagine there are emergency situations where it just  
5 comes up all of a sudden and no one's able to appear as a  
6 captain; would that be a fair statement?

7 A. Yes.

8 Q. But after a stabbing, after a serious incident or a  
9 slashing, there would be captains on the scene in case the  
10 violence continued, correct?

11 A. Yes.

12 Q. And was that in the scope of one of the things that you  
13 would be able to do in February of 2015 when you worked the 7  
14 to 3 tour?

15 A. Yes.

16 Q. In fact, captains supervise searches frequently, correct?

17 A. Every day.

18 Q. Every day. Okay. But captains, female captains are not  
19 supposed to supervise male strip searches, are they?

20 A. No.

21 Q. And in fact, there would have to be male captains present  
22 if in fact an appropriate strip search was to be conducted of a  
23 male inmate, correct?

24 A. Yes.

25 Q. And in fact, if not, the rules were being violated,

J941mcc5

Bell - Direct

1 correct?

2 A. Repeat your question?

3 Q. If a female captain supervises a strip search of a male, a  
4 rule would be violated, correct?

5 A. Yes.

6 Q. Now is there a method of calling for backup if an inmate is  
7 resisting a search?

8 A. Calling for backup?

9 Q. Yeah.

10 A. What's the situation?

11 Q. Well, let's say there's an inmate who refuses to be strip  
12 searched and is cursing, or allegedly cursing at the officer  
13 trying to strip search him. Would it be appropriate at that  
14 point for a CO to in some way ask for backup?

15 MS. GOYKADOSH: Objection.

16 THE COURT: Thank you. Sustained.

17 Q. Now is it fair to say that a captain can stop a CO from  
18 using force if she deems it inappropriate?

19 A. If there's a situation and the officer calls for the  
20 supervisor, the supervisor can go over to the situation and try  
21 to use IPC skills to stop the situation.

22 Q. Well --

23 THE COURT: I'm sorry. What's an IPC skill?

24 THE WITNESS: It means interpersonal communication.

25 THE COURT: Thank you.

J941mcc5

Bell - Direct

1 Please proceed.

2 Q. Now can a supervisor, captain, can she stop a correction  
3 officer, say, hey, you're using too much force, if you find  
4 that that's in fact the case?

5 A. If the use of force is already in progress, the supervisor,  
6 he or she, just try to supervise the situation.

7 Q. By supervise the situation, in some instances it would call  
8 for asking for the force to cease and desist, correct?

9 A. If the use of force is already in progress?

10 Q. Well, if there's no reason to use force at that point and  
11 the captain is there, can the captain order the officer to stop  
12 using force?

13 A. If there's a situation going on and --

14 Q. Captain, please, yes or no. In my circumstance that I  
15 described, can a captain order a CO to stop using force?

16 A. Ask your question again. I didn't hear it.

17 Q. Sure.

18 MR. LICHTMACHER: Can we have a readback.

19 THE COURT: Please re-inquire, counsel.

20 Q. Okay. If a captain witnesses force being used which is no  
21 longer necessary, can she order the CO using the force to cease  
22 and desist? Yes or no, please.

23 MS. GOYKADOSH: Objection.

24 THE COURT: Thank you. Sustained.

25 Q. Are there times when a captain can order a CO to stop using

J941mcc5

Bell - Direct

1 force?

2 MS. GOYKADOSH: Objection.

3 THE COURT: You can answer the question.

4 A. Yes.

5 Q. And is one of those times when the force is unnecessary?

6 A. I wouldn't say it was unnecessary. If the situation is  
7 getting out of hand, the captain can say, oh, if the inmate is  
8 restrained, okay, that's it.

9 Q. Captain, I didn't describe the situation. If the  
10 situation, the use of force is unnecessary, can the captain  
11 order the CO to stop using force?

12 MS. GOYKADOSH: Objection.

13 THE COURT: Thank you.

14 You can answer the question.

15 A. Again, if the captain deems the situation out of hand, they  
16 can stop the officer, yes.

17 Q. Thank you.

18 Now isn't it true that you're required to stop a  
19 correction officer from using unnecessary force?

20 A. Repeat your question?

21 Q. Isn't it true that you are required, if you witness it, to  
22 stop a correction officer from using unnecessary force?

23 A. Yes.

24 Q. And but a CO, correction officer -- can I use the term CO?  
25 Is that understood?

J941mcc5

Bell - Direct

1 A. Sure.

2 Q. Sure. Is the CO able to order a captain, hey, stop using  
3 force?

4 A. They don't order a captain, but they can tell a captain,  
5 stop.

6 Q. And in fact, COs generally cannot give orders to captains,  
7 correct?

8 A. No.

9 Q. Now are captains able to write up COs for bad behavior  
10 while they're on duty?

11 MS. GOYKADOSH: Objection.

12 THE COURT: Thank you. Sustained.

13 Q. Are there occasions where captains write up COs because  
14 they've done something inappropriate?

15 MS. GOYKADOSH: Objection.

16 THE COURT: Thank you. Sustained.

17 Q. Can COs -- excuse me. Can captains have COs disciplined?

18 MS. GOYKADOSH: Objection.

19 THE COURT: Thank you. Sustained.

20 Can we focus on the incident at issue in the case.

21 MR. LICHTMACHER: We actually -- okay.

22 Q. Now do you remember an incident from -- withdrawn.

23 Were you involved in an incident on February 19, 2015,  
24 involving Mr. McCurdy?

25 A. No.

J941mcc5

Bell - Direct

1 Q. Well, you gave a deposition in this case, didn't you?

2 A. Yes.

3 Q. And that deposition was on May 30, 2018, is that correct?

4 A. Yes.

5 MR. LICHTMACHER: May I approach the witness, your  
6 Honor.

7 THE COURT: You may.

8 MR. LICHTMACHER: Handing the witness the deposition  
9 transcript.

10 Q. Is that your deposition transcript?

11 A. It is.

12 Q. Okay. Now on May 30, 2018, when you gave that deposition,  
13 did you raise your right hand and swear to tell the truth?

14 A. I did.

15 Q. And did you in fact tell the truth?

16 A. I did.

17 Q. And in fact, you were given a copy of that deposition after  
18 you testified at some point and asked if any changes were  
19 necessary, correct?

20 A. At some point I was given this deposition, yes.

21 Q. Okay. And did you make any changes to the deposition?

22 A. No.

23 Q. So you deemed the testimony you gave under penalty of  
24 perjury to be correct, is that correct?

25 A. Yes.

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Bell - Direct

1 Q. Turning to page 4, line 24. Tell me when you're ready,  
2 Captain.

3 A. I'm ready.

4 Q. "Q. Were you involved in an incident on February 19, 2015,  
5 involving Mr. McCurdy?

6 "A. I don't remember the date.

7 "Q. I think your attorney will stipulate that was the  
8 date of the incident that we're here about."

9 And the corporation counsel who was present at the  
10 time said: "Correct."

11 MS. GOYKADOSH: Your Honor, I'm not sure what  
12 Mr. Lichtmacher is reading to, but I don't know what's proper  
13 impeachment in here, so I just -- I didn't get --

14 THE COURT: I'm sorry. Is this not a party?

15 MR. LICHTMACHER: What?

16 MS. GOYKADOSH: I just don't know what's being --

17 THE COURT: I'm sorry. Please come forward.

18 (Continued on next page)



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Bell - Direct

1 (At the sidebar)

2 THE COURT: Thank you.

3 Go ahead, counsel. I understand there's an objection?

4 MS. GOYKADOSH: My issue is only that I just wanted to  
5 know where Mr. Lichtmacher will be reading until, just so I can  
6 know where he will be reading till. That's all I want to know.

7 THE COURT: Thank you.

8 So the comment about impeachment was irrelevant, is  
9 that correct?

10 MS. GOYKADOSH: I just want to make sure that if he's  
11 impeaching the witness, it is proper impeachment. If it's an  
12 inconsistent statement.

13 THE COURT: Thank you.

14 Is she not a party?

15 MS. GOYKADOSH: She is a party.

16 THE COURT: Thank you.

17 So can he only use her deposition for impeachment  
18 purposes?

19 MS. GOYKADOSH: Her deposition can be used for any  
20 purpose under Rule 32.

21 THE COURT: Thank you.

22 MS. GOYKADOSH: However, the way that the questions  
23 were framed were such that it implied that they were being used  
24 for impeachment. So all I want to know is where  
25 Mr. Lichtmacher is reading till.

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Bell - Direct

1 MR. LICHTMACHER: Page 5, line 11. And it is  
2 impeachment, your Honor.

3 THE COURT: Thank you.

4 Please proceed. As counsel has described, the  
5 deposition for a party can be used for any purpose.

6 MR. LICHTMACHER: May I start from the beginning of  
7 the reading? It's not long.

8 THE COURT: Yes, you may.

9 And again, counsel, how you wish to use our time for  
10 the afternoon is up to you.

11 Let's proceed, counsel.

12 MS. GOYKADOSH: Thank you, your Honor.

13 MR. LICHTMACHER: Thank you.

14 (Continued on next page)  
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J941mcc5

Bell - Direct

1 (In open court)

2 THE COURT: Thank you, counsel. You can proceed. I  
3 apologize for the interruption.

4 MR. LICHTMACHER: Excuse me, your Honor. I'm going to  
5 go back to the beginning of that. It's short.

6 BY MR. LICHTMACHER:

7 Q. So did you give these answers to these questions on May 30,  
8 2018 -- page 4, line 24:

9 "Q. Were you involved in an incident on February 19,  
10 2015, involving Mr. McCurdy?

11 "A. I don't remember the date.

12 "Q. I think your attorney will stipulate that was the  
13 date of the incident that we're here about."

14 The attorney: "Correct."

15 "A. I can't remember what the incident was, so I  
16 can't tell you anything about the incident because I don't  
17 remember it."

18 You gave that testimony on that day, correct?

19 A. I did.

20 Q. So on that day you didn't remember it, but today, you  
21 remember that you weren't involved in the incident, is that  
22 correct?

23 A. I was not involved in the incident.

24 Q. Well, on that day you did say something slightly different,  
25 didn't you?

J941mcc5

Bell - Direct

1 A. I told you I didn't remember the incident so I couldn't  
2 comment on it.

3 Q. But now you know that you weren't involved in it. They are  
4 different, aren't they?

5 A. I was not involved in the incident.

6 Q. Well, is there a difference to you between "I don't  
7 remember it" and "I wasn't involved in it"? Do you think those  
8 are the same thing?

9 MS. GOYKADOSH: Objection.

10 THE COURT: Thank you. Sustained.

11 Q. Now what did you rely on to determine that you weren't  
12 involved in the incident?

13 A. I remembered the incident. Once the incident -- once the  
14 incident date -- date was brought to me, then I remembered the  
15 incident.

16 Q. Well, I asked you in the questions I read you if you were  
17 involved in an incident on February 19, 2015, and you said  
18 specifically at your deposition I just read, "I don't remember  
19 it." Didn't you?

20 A. And my answer didn't change. I didn't remember it at that  
21 time.

22 Q. Oh. So you didn't remember it because you didn't know the  
23 date, but now you know. Then you were told the date; you still  
24 didn't remember it.

25 MS. GOYKADOSH: Objection.

J941mcc5

Bell - Direct

1 THE COURT: Thank you.

2 Can you please rephrase the question, counsel.

3 MR. LICHTMACHER: Sure.

4 Q. You were told the date that day, and after you were told  
5 the date, you still didn't remember the incident, is that  
6 correct?

7 A. Once the date -- once I realized what the date was, then I  
8 remembered what the incident was, sir.

9 Q. Well, did you realize what the date was when I told it to  
10 you on May 30, 2018?

11 MS. GOYKADOSH: Objection.

12 THE COURT: Thank you.

13 You can answer the question.

14 A. When you asked the question and I answered it and told you  
15 I didn't remember it, that was -- at that moment, I did not  
16 remember what the incident was.

17 Q. How was it you came to remember what the incident was?

18 A. Once the date -- again, once the date was told to me, then  
19 I remembered what the incident was.

20 Q. So the date must have been told to you again after I told  
21 it to you, and then you remembered that you weren't there, is  
22 that right?

23 A. You asked me if I was involved. I was not involved in the  
24 incident.

25 Q. You witnessed the incident?

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Bell - Direct

1 A. No.

2 Q. Do you have any idea why Officer Mitchell places you there  
3 during the use of force?

4 MS. GOYKADOSH: Objection.

5 THE COURT: Thank you.

6 Can you rephrase the question, please, counsel.

7 MR. LICHTMACHER: Sure.

8 Q. You were here when Officer Mitchell was impeached with the  
9 statement that you were there during the use of force. You  
10 were here for that, correct?

11 A. I was.

12 Q. And so he was incorrect, I take it, Officer Mitchell.

13 A. I was in the area of the use of force. I was not involved  
14 in the use of force.

15 Q. Well, he testified in the deposition that you were there  
16 for the use of force.

17 MS. GOYKADOSH: Objection.

18 THE COURT: Thank you. Sustained.

19 Q. So you were in the area, but you weren't involved in the  
20 use of force; is that your testimony?

21 A. Yes.

22 Q. Do you know why Chance McCurdy has named you as a defendant  
23 in this incident?

24 MS. GOYKADOSH: Objection.

25 THE COURT: Thank you. Sustained.

J941mcc5

Bell - Direct

1 Q. Chance McCurdy named you as a defendant in this incident,  
2 correct?

3 A. Yes.

4 Q. And you knew Chance McCurdy before this incident, correct?

5 A. I did.

6 Q. In fact, did you have any type of relationship with  
7 Mr. McCurdy?

8 A. No.

9 Q. Okay. You knew him for a while from where?

10 A. He's an inmate in AMKC.

11 Q. And you knew him as being an inmate in AMKC, correct?  
12 Correct?

13 A. Yes, sir.

14 Q. And did you interact with him at any occasions?

15 A. I did.

16 Q. And on those occasions were they contentious?

17 Your interactions with him, did they cause any  
18 hostility between the two of you?

19 A. No.

20 Q. So you don't know why he named you, correct?

21 A. I have no idea.

22 Q. And how far from the area where the force was used were  
23 you?

24 A. I was in the front of the tier.

25 Q. How far away is that from where the incident happened?

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Bell - Direct

1 Well, withdrawn.

2 Do you know where the incident happened?

3 A. The incident happened in the back of the tier. I was in  
4 the front of the tier.

5 Q. Okay. When did you learn where the incident happened?

6 THE COURT: I'm sorry. Can I just ask: What is a  
7 tier?

8 THE WITNESS: A tier is the hallway of the housing  
9 area where the inmates live.

10 THE COURT: And how far is the front of the tier from  
11 the back of the tier?

12 THE WITNESS: The tier would be from, let's say, here  
13 to that back chair. It could be that long.

14 THE COURT: I'm sorry. From the witness stand to the  
15 back of the courtroom?

16 THE WITNESS: From here, the back of this wall, to  
17 where that last black chair is. That could be --

18 THE COURT: Thank you. From the back of the  
19 courtroom, where the --

20 THE WITNESS: Where that black chair is to maybe here.

21 THE COURT: To the back of the well before the  
22 gallery.

23 THE WITNESS: Mm-hmm.

24 THE COURT: Thank you.

25 BY MR. LICHTMACHER:



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Bell - Direct

1 Q. Would you say that's about 120 feet?

2 A. I have no idea what it is.

3 Q. Did you ever play baseball or softball?

4 A. Never.

5 Q. Never played? Okay. Do you watch baseball?

6 A. I don't watch sports.

7 Q. You don't watch sports. Okay. So you won't know if that  
8 was like from home plate to second base. You wouldn't know.

9 MS. GOYKADOSH: Objection.

10 THE COURT: Thank you. Sustained.

11 Q. Okay. So now did you hear the incident happening?

12 A. I heard a commotion.

13 Q. And when you heard the commotion, did you react in any way?

14 A. I did.

15 Q. How did you react?

16 A. I told the officers on the tier to secure the inmates.

17 Q. And you remember that now, as you sit here today?

18 A. I just answered your question. Yes.

19 Q. All right. So you didn't supply that answer when I asked  
20 you about the incident at your deposition, did you?

21 MS. GOYKADOSH: Objection.

22 THE COURT: Thank you. Sustained.

23 Counsel, if you have a specific inquiry, please  
24 proceed.

25 MR. LICHTMACHER: Sure.

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Bell - Direct

1 Q. Now you became aware that force was used, correct?

2 A. I did.

3 Q. Otherwise no use of force report would be generated,  
4 correct?

5 MS. GOYKADOSH: Objection.

6 THE COURT: Thank you. Sustained.

7 Q. Did you generate a use of force report in this incident?

8 A. No.

9 Q. You didn't generate any use of force report.

10 A. I didn't generate a use of force report, no.

11 Q. Of any kind, like saying that you weren't involved or  
12 anything like that?

13 A. I generated a use of force witness.

14 Q. Ah. Okay. And what was that? What was the content of  
15 that, in sum and substance?

16 A. The use of force witness is generated by -- by everybody  
17 that's in the area, so whether you're involved in the use of  
18 force or not, you have to generate a use of force witness or a  
19 use of force report.

20 Q. Now did you understand that Chance McCurdy was taken for --  
21 well, withdrawn.

22 Do you regularly work on that tier that Chance McCurdy  
23 was housed in?

24 A. No.

25 Q. Did you work on that same floor?

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Bell - Direct

1 A. I don't know what you mean by floor.

2 Q. Okay. What floor is that tier located on, where the  
3 incident transpired?

4 A. It's all one level of the jail. It's --

5 Q. Okay. It's all one level. How far away -- well, did you  
6 have a regular post at that time?

7 A. I didn't hear you.

8 Q. Did you have a regular post at that time?

9 A. Yes.

10 Q. And where was the post?

11 A. I was a security captain of AMKC.

12 Q. Okay. So did that involve your traveling to where Chance  
13 McCurdy was housed?

14 A. I traveled the whole building, yes.

15 Q. Okay. So you walked the building during your tour of duty,  
16 is that correct?

17 A. Yes.

18 Q. All right. And so there would be times when you'd go where  
19 Chance McCurdy was, correct?

20 A. It depends on where he was, but yes.

21 Q. Did you become aware of him going for medical treatment  
22 that day?

23 A. Later I learned that he went for medical treatment.

24 Q. Did you follow him to the hospital?

25 A. That's not authorized, sir.

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Bell - Direct

1 Q. Okay. I asked if you did it. Did you follow him to the  
2 hospital?

3 A. That's not authorized.

4 Q. I didn't ask you that. I asked you if you did it.

5 A. No.

6 Q. You didn't go to the hospital with him?

7 A. We're not allowed to do that, no.

8 Q. Now if a captain participates in a use of force and it's  
9 deemed unnecessary, can problems arise for that captain?

10 MS. GOYKADOSH: Objection.

11 THE COURT: Thank you. Sustained.

12 MR. LICHTMACHER: Can I approach, your Honor.

13 THE COURT: Thank you. You may.

14 MR. LICHTMACHER: No, I mean, I want a sidebar.

15 Excuse me.

16 THE COURT: Yes, you may.

17 MR. LICHTMACHER: I misspoke.

18 THE COURT: Come on up.

19 (Continued on next page)  
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J941mcc5

Bell - Direct

1 (At the sidebar)

2 THE COURT: Thank you.

3 First, there's an objection. I sustained it. I  
4 understood the basis for the objection to be that you're  
5 positing a hypothetical to the witness and asking her to  
6 respond to it. Much the same way that there was a prior  
7 objection with respect to using Officer Mitchell as an  
8 unnoticed expert, I understood that the basis for the objection  
9 posited here was the posing of hypotheticals to Captain Bell.

10 Counsel for defendants, what was the basis for the  
11 objection? That was the reason upon which I sustained the  
12 objection.

13 MS. GOYKADOSH: That was my objection as well, your  
14 Honor.

15 THE COURT: Thank you.

16 Counsel for plaintiff?

17 MR. LICHTMACHER: Now I indicated in the papers to the  
18 Court that I would approach before I attempted to do this.  
19 Captain Bell has an enormous history of getting in trouble for  
20 using force, excessive force, and for not supervising or  
21 correcting people who use force. We believe -- and I wanted to  
22 have Chance McCurdy here to do it, but I'll try to put in part  
23 of his deposition, if I can -- that the reason for her being  
24 disingenuous about her being there -- he's indicated at his  
25 deposition she punched him several times -- is that she had

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Bell - Direct

1 been in so much trouble, she had been force monitored, she had  
2 lost 35 days' comp time on one occasion, 30 days' vacation pay  
3 one occasion, 10 days' vacation pay on another occasion. She  
4 was in a lot of trouble. And they were all very close -- those  
5 incidents were very close to this incident. Early in her  
6 career, she had been force monitored.

7 Now I would like to introduce evidence that she has a  
8 reason to lie because so many times she'd been caught using  
9 excessive force, and to connect it that she was there, I will  
10 offer parts of Mr. McCurdy's deposition transcript, as he  
11 appears to be unavailable. Of course not unavailable;  
12 unwilling to appear in court. I won't go into detail. I'll  
13 just ask if she was found to have used excessive force and  
14 penalized that amount of time. And that's all I want to go  
15 into.

16 But one other thing I should mention. If I'm allowed  
17 to inquire, she was found to have hit a guy repeatedly in the  
18 head with a radio on one occasion. This is a woman with an  
19 enormous record for violence.

20 And there's more, but these are the things I think I  
21 can get in. I have documents to support them.

22 THE COURT: Thank you.

23 What's the basis for the contention that the jury  
24 should infer from this history that she has a motivation to lie  
25 here?

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Bell - Direct

1 MR. LICHTMACHER: Because she'll get in additional  
2 trouble, and that's why I asked about -- and you didn't allow  
3 the question -- if captains, you know, use excessive force, can  
4 they be disciplined, and the discipline actually escalates over  
5 time when they've been found numerous times. I'd like you to  
6 allow me to revisit that issue and ask if captains can be  
7 disciplined, because this goes directly to motive to lie,  
8 because she'd been disciplined so much that this brings it to  
9 the point where she could be terminated, and that's why we  
10 believe that she lied about her involvement in the incident.

11 THE COURT: Thank you.

12 Counsel for defendants?

13 MS. GOYKADOSH: Your Honor, I don't want to waste a  
14 lot of time. I don't believe plaintiff's counsel is raising  
15 any new arguments that he hasn't raised before and that have  
16 not been rejected.

17 Again, first of all, there's been a  
18 mischaracterization calling her disciplinary history enormous.  
19 There are three substantiated incidents on her disciplinary  
20 history. That's certainly not enormous for somebody with a  
21 20-year career.

22 Number two, there's also been -- I don't have a  
23 document in front of me, but I don't believe that what has  
24 happened in this case is progressive discipline. I believe  
25 that the second incident, she actually received less days lost

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Bell - Direct

1 than the first incident. So I don't think that comports with  
2 what Mr. Lichtmacher was saying.

3 And these incidents -- again, my belief; I don't have  
4 a document in front of -- me, were in 2011 and 2013, so while  
5 they are about two years before the incident, it's not like it  
6 was 10 days, 15 days.

7 I don't believe there's any reason to introduce these.  
8 It seems to be something that would be precluded under  
9 Rule 404(b), and there are also 403 concerns, so it should not  
10 be allowed in.

11 MR. LICHTMACHER: If I may. I'm sorry.

12 THE COURT: Yes.

13 MR. LICHTMACHER: The disciplines were inflicted  
14 substantially after the events and they were very near to this  
15 event, and I have the documents for that. So these incidents  
16 happened in 2011, one in 2013, one in 2014 on a 5/15/13.  
17 Sorry. That was the -- no. I got the wrong number there. It  
18 was an incident from 5/15/13. My mistake. But the penalties  
19 each time and the pleas out are later dates. They're signed on  
20 later dates; they're generated on later dates. So she was  
21 being disciplined for these acts.

22 So I'd like to do a very simple inquiry that these  
23 escalate and she was disciplined for, haven't you been --

24 THE COURT: I'm sorry. Can you raise your voice.

25 MR. LICHTMACHER: I'm trying to find the middle



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Bell - Direct

1 ground.

2 Okay. Can you be disciplined for being found to have  
3 used excessive force? Haven't you been so disciplined? And  
4 can you be disciplined for failure to supervise excessive use  
5 of force? And haven't you been so disciplined? And did you  
6 lose this amount of time and these amount of dates? And even  
7 though the incidents were from those dates, this one was  
8 inflicted much later, closer to the time of this incident?  
9 That's all I want to ask, your Honor, and I think it's  
10 appropriate, and I think it goes not to show propensity but to  
11 show that she has motive to lie.

12 Oh, and obviously I want to ask -- I don't know if I  
13 just said it -- if the discipline can escalate where she's in  
14 danger of termination.

15 THE COURT: Thank you.

16 MS. GOYKADOSH: Your Honor, again, we submitted a  
17 letter about this. Under civil service law, you can't just be  
18 terminated. There needs to be a hearing; there are steps that  
19 need to be taken. Is this going to be asked from this witness?  
20 Again, this is a mini trial issue.

21 No. 1, her discipline is absolutely not relevant.

22 No. 2, it's confusing under Rule 403.

23 No. 3, it seems to be a 404(b) issue.

24 I know Mr. Lichtmacher said he's not introducing it  
25 for propensity, but I think he's trying to circumvent that just

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Bell - Direct

1 by saying that. I don't think this evidence should be  
2 introduced.

3 THE COURT: Thank you. Let me just say a few words.

4 First, we may need to take a short break to resolve  
5 this. I'll probably excuse the jury momentarily.

6 MR. LICHTMACHER: Sorry, your Honor.

7 THE COURT: That's fine.

8 Second, while they're out, we'll discuss this in more  
9 depth.

10 I just want to provide a few comments before I excuse  
11 them for you to consider the issues.

12 Counsel has provided a justification for why this  
13 evidence should come in in spite of Rule 404(b) -- namely,  
14 motive, and in a sense, motivation to lie. So under the  
15 inclusionary rule used by the Second Circuit, I believe that  
16 404(b) is not a bar. I, as a result, expect to engage in some  
17 conversation with you after I excuse the jury for a short  
18 recess regarding whether and to what extent any I'll call it  
19 propensity implications of this evidence might be cured through  
20 an instruction that they're not to accept this evidence as  
21 evidence of propensity. I think that plaintiff has made a  
22 reasonable argument that the possibility of sanction or  
23 something similar might provide her with a motivation to lie  
24 here, and as a result, I think it's reasonable grounds for  
25 cross-examination. I'd expect to limit the extent to which he

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1 can bring in specific evidence regarding the prior actions in  
2 order to avoid the trial within a trial.

3 But I think in order to work out a limiting  
4 instruction further, I'm going to let the jury go.

5 MR. LICHTMACHER: Thank you, your Honor.

6 (In open court)

7 THE COURT: So ladies and gentlemen, I'd like to take  
8 a short break, if you don't mind, probably about 10 minutes for  
9 this recess. During this break, as always, please don't  
10 discuss the case amongst yourselves, don't communicate about it  
11 with anyone else, and don't do any research about the case.

12 See you back here in just a few minutes. Thank you.

13 (Jury not present)

14 THE COURT: Thank you. You can be seated.

15 Good. So counsel, to follow up on this line of  
16 conversation before we step down for a very short recess --  
17 very short, let me emphasize that -- the series of questions  
18 that counsel has described, with the exception of the extent of  
19 the discipline received on each occasion, appears to me to be  
20 within reasonable grounds for cross-examination. I will permit  
21 it with respect to the question regarding whether sanctions are  
22 available, whether prior sanctions have been imposed, whether  
23 she had a motivation as a result to prevaricate here. Because  
24 of the 404(b) concerns, I would have to impose a limiting  
25 instruction to the jury with respect to the use of this

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1 evidence, and I request that the parties provide me with one.  
2 I do not expect to spend much more time beyond that first set  
3 of high-level questions, however, but I think that counsel for  
4 plaintiff has made a reasonable argument regarding why it is  
5 that that's a proper basis for cross-examination, and I  
6 hesitate to restrain him, understanding that there are  
7 alternative means to deal with the potential prejudice or  
8 misuse of this information -- namely, through a limiting  
9 instruction -- regarding how it may be read.

10 So counsel, I will happily prepare a short limiting  
11 instruction of that sort. My preference would be that you  
12 would prepare one. But I agree ultimately with plaintiff that  
13 some very limited inquiry on this line is appropriate. But  
14 again, it should be very limited as I've just outlined, which  
15 is essentially, I'll call it, concurrent with what plaintiff  
16 was suggesting with the exception of the statement regarding  
17 the consequences of the discipline, unless counsel for  
18 defendants would prefer that that information come in.

19 MS. GOYKADOSH: I have a question, your Honor.

20 THE COURT: Yes.

21 MS. GOYKADOSH: So just to be clear, we're not getting  
22 into any of the underlying facts. We're just asking if there  
23 are sanctions available, if there were sanctions imposed, and  
24 if that somehow created a motivation to lie. Nothing about any  
25 radios, any kicks, any of the facts underlying --

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1 THE COURT: Correct. Correct.

2 MS. GOYKADOSH: Okay. Thank you, your Honor.

3 MR. LICHTMACHER: So I may not inquire -- may I be  
4 seated, your Honor.

5 THE COURT: Yes.

6 MR. LICHTMACHER: Thank you. I appreciate that.

7 I may not inquire to the amount of time that she  
8 missed vacation days and comp time that was taken away, just  
9 the fact that vacation days and comp time was taken away,  
10 correct?

11 THE COURT: Thank you. That's my inclination, barring  
12 objection by defendants, simply because I am concerned that the  
13 incremental prejudice associated with that additional  
14 information may outweigh the probative value of the line of  
15 inquiry. If counsel for defendants takes the position that  
16 that information is actually significant or important in order  
17 to suggest the scale of the nature of the consequences here,  
18 perhaps I'll hear argument from them to that effect now.

19 MS. GOYKADOSH: No, your Honor. We agree that that  
20 information should not come in.

21 But I just want to ask one more question. Plaintiff's  
22 counsel is not going to be allowed to introduce any documents,  
23 right? It's just these questions.

24 THE COURT: Correct.

25 MS. GOYKADOSH: Thank you.

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1 THE COURT: Yes, I don't expect that he'll be proving  
2 this through extrinsic evidence.

3 MR. LICHTMACHER: Except, your Honor, I want to put  
4 the documents in front of the witness, not to the jury, for  
5 impeachment purposes, to ask her if it refreshes her  
6 recollection.

7 THE COURT: Thank you.

8 We can address that if recollection needs to be  
9 refreshed or if impeachment needs to take place. Otherwise,  
10 there's no need to do so.

11 Let's just take one very short moment to address the  
12 issue raised by counsel, I'll call it by implication just  
13 now -- namely, whether the plaintiff is unavailable and  
14 therefore permitting the use of his deposition at trial. That  
15 I understand to have been the suggestion. Of course, the  
16 witness arguably was available. He just chose not to come.

17 So counsel for defendants, what's your view regarding  
18 that issue, and in particular, what's your view regarding the  
19 law regarding availability and the assessment of whether or not  
20 a deposition can be used under these circumstances? Counsel?

21 MS. GOYKADOSH: Your Honor, I agree with the Court  
22 that I don't think he's unavailable. I know that Rule 32 says  
23 that an adverse party can use a deposition for any purpose. I  
24 don't know if the party themselves can. I just need to read  
25 the rule again, if I can have a moment.

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1 THE COURT: Thank you. Good.

2 Thank you.

3 So counsel, let me just make sure that you're looking  
4 to the right section. I agree that Rule 32(a)(3) speaks to  
5 depositions of a party, which has the adverse party limitation.  
6 I understand that counsel for plaintiff would be relying on  
7 32(a)(4).

8 MS. GOYKADOSH: Yes, your Honor. So he's not  
9 available. I mean, he's not dead. He's not more than a  
10 hundred miles away from this courthouse. He cannot not intend  
11 to testify because of any age, illness, infirmity or  
12 imprisonment. He can testify even though he's imprisoned. And  
13 there's no issue with the subpoena here. So -- and then the  
14 next one --

15 MR. LICHTMACHER: Your Honor, we don't disagree. I've  
16 been down this road, unfortunately, before. I want to save the  
17 Court some time, because I know you're concerned with wasting  
18 time.

19 THE COURT: Thank you very much, Mr. Lichtmacher. I  
20 understand this is not an issue.

21 MR. LICHTMACHER: Except --

22 THE COURT: Yes.

23 MR. LICHTMACHER: -- if they introduce testimony from  
24 his deposition, there is nothing in the rule from precluding me  
25 from putting in rebuttal testimony about the same issues from

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1 the same deposition.

2 THE COURT: Thank you. Perhaps, or also, you might  
3 make an argument regarding the rule of completeness. I don't  
4 know to what extent defendants will wish to put on a case here.

5 Good. I'm going to step down now briefly. Let's take  
6 a very short break so that we can bring the jury back in  
7 promptly.

8 Counsel, please let me know if you'd like to propose a  
9 particular instruction. I will otherwise propose one. But I  
10 prefer to hear from the parties regarding your proposal. If  
11 you can develop that within the next short window of time, I  
12 would appreciate it.

13 MS. GOYKADOSH: We will do so.

14 THE COURT: I'm stepping down now. Thank you.

15 MS. GOYKADOSH: Thank you, your Honor.

16 (Recess)

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(Jury not present)

THE COURT: Counsel, are you ready to proceed? If so, Ms. Nelson, would you please bring in the jury.

Captain Bell, please come forward.

MR. SIDDIQI: Your Honor, are we taking up that language now or later?

THE COURT: Oh, please, tell me what you propose.

MR. SIDDIQI: We agree on the first sentence, so I'll read that first.

THE COURT: You can hand it forward. I'd appreciate that.

MR. SIDDIQI: My handwriting is probably not legible.

THE COURT: That's fine. Please feel free to read it.

MR. SIDDIQI: "I am about to allow plaintiff to introduce evidence regarding prior acts of defendant Bell. I am instructing you that you are not to draw any conclusion from this evidence that because defendant Bell engaged in certain conduct in the past that this predisposed her to engage in the same conduct later."

THE COURT: Thank you. I understand the parties agreed on the first sentence there?

MR. SIDDIQI: The first -- I'm sorry, these two sentences are agreed on.

THE COURT: Thank you very much.

MR. SIDDIQI: The sentence I am about to read is not

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1 agreed on.

2 THE COURT: Thank you.

3 MR. SIDDIQI: "I further instruct you not to use this  
4 evidence in coming to any judgment regarding defendant Bell's  
5 character."

6 THE COURT: Thank you. You can hand it forward.

7 MR. LICHTMACHER: For the record, your Honor, we do  
8 object to that last sentence because the motive to lie implies  
9 lying, and lying does go to character.

10 (Pause)

11 THE COURT: Thank you. So the parties' proposed  
12 instruction says nothing about the use for which the  
13 prospective jurors may use the evidence.

14 Counsel for plaintiff, I understand you intend to  
15 introduce it for the purpose of showing defendant Bell's  
16 circumstances that may be relevant to defendant Bell's  
17 credibility?

18 MR. LICHTMACHER: Yes. And that, as I said all along,  
19 not to be redundant, she had a motive to lie, and take herself  
20 out of the situation. And I will go into that on my  
21 cross-examination.

22 Your Honor, I left tabs in the medical records. They  
23 can be pulled out. I'm sorry that would be inappropriate to  
24 show the jury. It's just Post-Its.

25 THE COURT: Thank you. We will have those removed.

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1           So I propose to modify your proposed instruction as  
2 follows: It would read as follows: "The evidence you have  
3 heard regarding other disciplinary actions against Captain  
4 Bell" -- actually, I will say "regarding disciplinary actions  
5 regarding Captain Bell," pardon me.

6           It would read as follows: "The evidence you've heard  
7 regarding prior disciplinary actions against Captain Bell was  
8 offered for a limited purpose only. Specifically, it was  
9 offered as proof of circumstances that may be relevant to an  
10 evaluation of defendant Bell's credibility and motivation to  
11 lie regarding the incident. It can be used by you to evaluate  
12 the defendant's motivation to lie; that is, whether she had a  
13 motivation to provide incorrect statements regarding her  
14 involvement in the incident at issue.

15           "However, defendant Bell is not on trial for  
16 committing or being involved in these other matters. You may  
17 not consider the evidence of these other matters as substitute  
18 for proof that defendant Bell committed the acts or omissions  
19 alleged in this case. You may not consider this evidence as  
20 proof that defendant Bell has a bad character or any propensity  
21 to commit the acts alleged here, nor may you used this evidence  
22 to conclude that because defendant Bell was accused of some  
23 other act or may have been involved in some other matter or  
24 disciplinary proceeding that she must also have committed the  
25 acts alleged in this case. You may only use this evidence, if

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1 at all, for the specific purpose I've instructed you here."

2 Counsel?

3 MR. LICHTMACHER: That's fine with the plaintiff, your  
4 Honor.

5 THE COURT: Counsel for defendants?

6 MR. SIDDIQI: That's fine with us, your Honor.

7 THE COURT: Good. Thank you.

8 MR. SIDDIQI: And, your Honor, I apologize for taking  
9 up more time. Plaintiff's counsel and I were speaking before,  
10 and I think I'm unclear as to the leeway the Court is  
11 providing. Is plaintiff allowed to inquire only as to the fact  
12 of previous discipline or also ask about the category of that  
13 discipline? In other words, was it a force discipline? Was it  
14 a failure to supervise discipline?

15 THE COURT: Thank you. I'm allowing what, again I'll  
16 use a term that may be relatively imprecise, so I apologize,  
17 him to inquire regarding what I'll call pedigree; namely,  
18 excessive force, failure to supervise, because they're germane  
19 to the issue here.

20 MR. LICHTMACHER: So I can inquire?

21 THE COURT: You may.

22 MR. SIDDIQI: Thank you for the clarification, your  
23 Honor.

24 THE COURT: But without specific detail regarding the  
25 underlying facts.

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1 MR. LICHTMACHER: I shouldn't have missed this, but  
2 are you giving the instruction before or after?

3 THE COURT: Thank you. I will provide it both in  
4 closing instructions, and I will provide a present tense  
5 version of it as you are about to introduce the evidence. So  
6 you should alert me that it's time for the limiting  
7 instruction.

8 MR. LICHTMACHER: It's time.

9 THE COURT: Fine. Thank you.

10 MR. LICHTMACHER: There will be a couple of foundation  
11 questions.

12 THE COURT: Fine.

13 MR. LICHTMACHER: And then it will be in, so I will  
14 alert you right after those.

15 THE COURT: Good. Thank you very much.

16 Ms. Nelson, would you please bring in the jury.

17 (Continued on next page)  
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(Jury present)

THE COURT: Thank you. You can be seated.

Counsel for plaintiff, you can proceed.

BY MR. LICHTMACHER:

Q. Isn't it true, Captain, that captains can be disciplined for using excessive force?

A. Yes.

Q. Isn't it also true, Captain, that captains can be disciplined for failure to supervise properly the use of excessive force?

A. Yes.

Q. And these disciplines can involve serious repercussions to a captain's career. Is that correct?

MS. GOYKADOSH: Objection.

THE COURT: Thank you.

You can answer the question.

A. Yes.

Q. And, in fact, the repercussions can get quite serious if the captain was found to have used excessive force or failed to supervise on numerous occasions, correct?

A. Yes.

MR. LICHTMACHER: Your Honor, at this point limiting instruction.

THE COURT: Thank you.

So, ladies and gentlemen, you are about to hear

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1 evidence regarding prior disciplinary actions against Captain  
2 Bell. This evidence will be introduced for a limited purpose  
3 only. Specifically, it will be offered as proof of  
4 circumstances that may be relevant to an evaluation of  
5 defendant Bell's credibility and motivation to lie regarding  
6 the incident. It can be used by you to evaluate defendant  
7 Bell's motivation to lie; that is, whether she has a motivation  
8 to and had a motivation to provide incorrect statements  
9 regarding her involvement in the incident at issue.

10 However, defendant Bell is not on trial for committing  
11 or being involved in these other matters. You may not consider  
12 the evidence of these other matters as substitute for proof  
13 that defendant Bell committed the acts or omissions alleged in  
14 this case. You may not consider this evidence as proof that  
15 defendant Bell has a bad character or any propensity to commit  
16 the acts alleged here, and nor may you use this evidence to  
17 conclude that because defendant Bell was accused of some other  
18 act or may have been involved in a prior disciplinary  
19 proceeding that she must also have committed the acts alleged  
20 in this case. You may use this evidence, if at all, for the  
21 specific purpose I have instructed you here.

22 Counsel for plaintiff, you can proceed.

23 MR. LICHTMACHER: Yes, sir.

24 BY MR. LICHTMACHER:

25 Q. Now, you've been disciplined for using excessive force on

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1 more than one occasion, haven't you, Captain?

2 A. Yes.

3 Q. In fact, you were disciplined for the use of excessive  
4 force for an incident that transpired on January 7, 2011,  
5 correct?

6 A. Yes.

7 Q. And you were disciplined for another use of excessive force  
8 on January 16, 2013, correct?

9 A. Yes.

10 Q. And you were disciplined again on May 15, 2013 for failure  
11 to supervise the use of excessive force, weren't you?

12 A. The charge was failure to supervise.

13 Q. Yes. The charge was use of force failure to supervise.  
14 Would you like to see the document?

15 A. It was failure to supervise.

16 MR. LICHTMACHER: May I approach the witness?

17 THE COURT: Thank you. Yes you may.

18 BY MR. LICHTMACHER:

19 Q. Now, first of all, is there anything that would refresh  
20 your recollection?

21 A. I know what the charges are. They were failure to  
22 supervise. It was failure to supervise.

23 Q. Well, with looking at your employee performance service  
24 report, your history of discipline, would that assist you in  
25 determining what the charges were that you were found guilty



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1 of?

2 A. No.

3 Q. It would not. OK.

4 MR. LICHTMACHER: Your Honor, under these  
5 circumstances, I ask to enter the document Plaintiff's 3.

6 MS. GOYKADOSH: Objection, your Honor.

7 THE COURT: Thank you. Counsel, can you please show  
8 the witness the document and ask her whether it refreshes her  
9 recollection.

10 MR. LICHTMACHER: Sure. I'm approaching the witness  
11 and handing her the document that's been marked as plaintiff's  
12 3. The bottom right there, Captain Bell.

13 THE COURT: Thank you. Thank you, counsel. You can  
14 inquire.

15 Q. Has looking at this document refreshed your recollection as  
16 to what appears on your disciplinary history?

17 A. Yes.

18 Q. And, in fact, you were disciplined on that occasion for  
19 failure to supervise use of force, correct?

20 A. I was charged with failure to supervise the use of --

21 THE COURT: I'm sorry. I'm sorry. Let me just ask  
22 the witness, would you please listen to the question and  
23 respond to it?

24 Q. In fact, you were disciplined on that occasion for failure  
25 to supervise the use of force, correct?

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1 A. Yes.

2 Q. OK. Now, Captain Bell, isn't it true that you have a  
3 motive to lie about this incident because you're afraid of  
4 future discipline?

5 A. That's a negative. No.

6 Q. And isn't it true that the discipline can escalate if  
7 you're found to repeatedly use excessive force?

8 A. If I was involved in another use of force, yes.

9 Q. And, in fact, if you're involved in another failure to  
10 supervise use of force, the discipline could escalate, correct?

11 A. Each discipline is different.

12 Q. Well, isn't it true that a series of incidents puts you in  
13 greater danger in terms of the possible disciplinary action  
14 that can be taken against you?

15 A. It can be.

16 MS. GOYKADOSH: Objection.

17 THE COURT: Thank you. I accept the answer.

18 Q. OK. So asking you one last time, Captain, didn't you have  
19 a motive to say that you weren't involved in issues of force  
20 because you had had all those incidents in a relatively short  
21 time before this?

22 A. That's a negative. I was never involved in issues of  
23 force.

24 Q. And you have no idea why initially Corrections Officer  
25 Mitchell places you on the scene at the use of force as he was

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Bell - Cross

1 shown to have said in his deposition?

2 MS. GOYKADOSH: Objection.

3 THE COURT: Thank you.

4 You can answer the question.

5 A. I was not involved in issues of force, sir.

6 Q. You have no idea why Corrections Officer Mitchell had  
7 testified at his deposition that you were present for the use  
8 of force? Could you please answer my question?

9 MS. GOYKADOSH: Objection.

10 THE COURT: Thank you. Sustained.

11 MR. LICHTMACHER: No more questions, your Honor.

12 THE COURT: Thank you.

13 Counsel for defendants.

14 CROSS-EXAMINATION

15 MS. GOYKADOSH: May I inquire, your Honor?

16 THE COURT: You may.

17 Q. Good afternoon, Captain Bell.

18 A. Good afternoon.

19 Q. Are you currently employed?

20 A. I am.

21 Q. By whom are you employed?

22 A. The New York City Department of Corrections.

23 Q. And how long have you been a member of the department of  
24 corrections?

25 A. 20 years.

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Bell - Cross

1 Q. Where are you presently assigned?

2 A. The emergency service unit.

3 Q. What's your assignment at the emergency services unit?

4 A. I'm the admin captain.

5 Q. Can you tell the jury what some of your duties and  
6 responsibilities as the admin captain at the emergency services  
7 unit are?

8 MR. LICHTMACHER: Objection, your Honor. Relevance.

9 THE COURT: Thank you.

10 You can answer the question.

11 A. I'm in charge of the officers' assignments, making sure the  
12 officers are where they are, their schedules.

13 Q. And was your rank captain on February 19, 2015?

14 A. It was.

15 Q. You were working that day?

16 A. I was.

17 Q. What tour were you scheduled to work?

18 A. 7:00 to 3:00.

19 Q. Were you wearing a uniform on February 19, 2015?

20 A. I was.

21 Q. Can you tell the jury, please, what your uniform consisted  
22 of?

23 A. My uniform -- my shirt is white, my pants are blue, my  
24 boots are black, and I have a duty belt.

25 Q. What equipment was on your duty belt?

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Bell - Cross

1 A. My handcuff case, I have chemical agents, I have a radio  
2 holder, and I have a glove pouch.

3 Q. Do you have any deadly weapons?

4 A. No.

5 Q. Why not?

6 A. We're not allowed to carry deadly weapons inside of the  
7 facilities.

8 Q. Why?

9 A. Because inmates could take it away and use it against us or  
10 each other.

11 Q. Could you please explain to the jury what some of your  
12 duties as a captain on February 19, 2015 were.

13 A. On that day, I was the security captain of AMKC.

14 Q. And what does a security captain do?

15 A. So the security captain is in charge of the SRGs in the  
16 building. We are in charge of the security of that facility.  
17 So we need to know where all the gangs are, all the SRG, all  
18 the -- basically we need to know what's going on in the  
19 facilities.

20 Q. Can you please tell the jury what the words SRG stand for?

21 A. Security risk group.

22 Q. What's a security risk group?

23 A. They're the gangs.

24 Q. And how big is AMKC?

25 A. AMKC can hold up to 2,000 inmates.

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Bell - Cross

1 Q. Were you working in a specific area in AMKC on February 19,  
2 2015?

3 A. I was.

4 Q. Which area was that?

5 A. Quad level 14.

6 Q. What is quad level 14?

7 A. Quad level 14 is a housing area that Blood inmates live.

8 Q. How many inmates live in that housing area?

9 A. 31.

10 Q. Was Chance McCurdy one of those inmates?

11 A. He was.

12 Q. Is there a reason why he was housed in that housing area?

13 A. Yes.

14 Q. Why is that?

15 A. Because he's a Blood member, and he can't live in any other  
16 housing area. He has to live in a housing area where Bloods  
17 are.

18 Q. What are the Bloods?

19 A. The Bloods is a violent street gang.

20 Q. What does it mean to be a member of the Bloods?

21 MR. LICHTMACHER: Objection, your Honor.

22 THE COURT: Thank you.

23 Can you please rephrase the question, Counsel?

24 BY MS. GOYKADOSH:

25 Q. If someone is a member of the Bloods, what does that mean?

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Bell - Cross

1 A. It means that you're a part of a gang.

2 Q. And did you know that plaintiff was a member of the Bloods?

3 A. I did.

4 Q. How did you know that?

5 A. He is assessed in our database as a Blood.

6 Q. Why did specifically know that he is a member of the  
7 Bloods?

8 A. Because I'm the security captain.

9 Q. Do you also know what plaintiff was convicted of?

10 A. Yes.

11 Q. What is that?

12 A. Rape.

13 Q. And how did you know that's what plaintiff was convicted  
14 of?

15 A. It's in our database.

16 Q. In your experience, is someone who is a sex offender  
17 treated differently by the other inmates?

18 MR. LICHTMACHER: Objection, your Honor.

19 THE COURT: Thank you. Sustained.

20 Counsel, can you rephrase?

21 BY MS. GOYKADOSH:

22 Q. Is someone who is a sex offender a person who you would  
23 rely upon in a jail setting?

24 A. Never.

25 MR. LICHTMACHER: Objection, your Honor.

J94Qmcc6

Bell - Cross

1 THE COURT: Thank you.

2 Counsel, can you rephrase, please?

3 Q. Is an inmate who's a sex offender someone who would command  
4 respect from other inmates based on your understanding?

5 MR. LICHTMACHER: Objection, your Honor.

6 THE COURT: Counsel, can I just see you briefly?

7 MS. GOYKADOSH: Yes.

8 (Continued on next page)

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J94Qmcc6

Bell - Cross

1 (At the side bar)

2 THE COURT: Thank you.

3 So just a few comments before I hear more from  
4 counsel. I understand that the questions that you have go to  
5 rebut what you had anticipated would be the plaintiff's  
6 narrative here and therefore your outline for questions to ask  
7 this witness.

8 At this point it's not clear to me that plaintiff will  
9 ever testify in a way that was anticipated. So I invited the  
10 parties up to talk about this line of questioning in the event  
11 that plaintiff McCurdy does not ultimately testify. So that is  
12 the basic question.

13 Counsel for plaintiff, what was the basis for your --  
14 that's the basis for my question.

15 Counsel for plaintiff, what was the basis for your  
16 objection?

17 MR. LICHTMACHER: Well, the objections that I've been  
18 making really they go to things that, first of all, may be  
19 outside of her scope. Partly, they're asking for hearsay to  
20 reach into other people's minds, what they think of him, if  
21 they would respect him. You know, even though she said, you  
22 know, in your experience what have you found, it relies on  
23 hearsay to do it.

24 The other thing is it is character impeachment.  
25 Without him being here, and it seemed like a cross-examination

J94Qmcc6

Bell - Cross

1 on things that he was expected to testify about, which he's not  
2 here to testify about as you stated a minute ago, so...

3 THE COURT: Thank you.

4 Counsel for defendants, let me just comment on the  
5 specific objections raised. I don't understand you to be  
6 eliciting a hearsay. At least that's not the import of it.  
7 Instead, you're asking for a statement regarding her  
8 understanding of the circumstances that have informed her  
9 behavior at the time. You're not soliciting information about  
10 the fact of the matter. To the extent that that's the issue  
11 raised by counsel for plaintiff, you may be able to rephrase  
12 the questions accordingly.

13 I have the other question, which is basically whether  
14 this is a narrative that adds much for the jury's perspective  
15 if the counter-narrative never comes in which appears to be  
16 the, unfortunately, probable outcome at this stage. So that's  
17 my basic question. Is this something that we need to explore  
18 in depth beyond what's already come out?

19 Counsel, what's your view?

20 MS. GOYKADOSH: I understand the Court's concern, and  
21 I share the same view that we should be efficient, and I do not  
22 believe that if Mr. McCurdy is not testifying there is a strong  
23 need to go here, go down this road. However, we do reserve our  
24 right, if by some chance Mr. McCurdy does show up, to ask these  
25 questions for rebuttal at that point. So that's our view.

J94Qmcc6

Bell - Cross

1 THE COURT: Absolutely.

2 MS. GOYKADOSH: Thank you, your Honor.

3 MR. LICHTMACHER: And I couldn't object to that.

4 THE COURT: Good.

5 MS. GOYKADOSH: Thank you, your Honor.

6 (Continued on next page)

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J94Qmcc6

Bell - Cross

1 (In open court)

2 MS. GOYKADOSH: May I proceed, your Honor?

3 THE COURT: Thank you. Yes, proceed.

4 MS. GOYKADOSH: Thank you, your Honor.

5 BY MS. GOYKADOSH:

6 Q. Did there come a point on February 19, 2015 when an  
7 institutional search was being conducted?

8 A. Yes.

9 Q. At approximately -- do you know why an institutional search  
10 was being conducted?

11 A. There was a slashing in the facility.

12 Q. Do you know what weapon was used in the slashing?

13 A. Scalpel.

14 Q. Why is it important to conduct a search after a slashing?

15 A. Because we need to recover the weapon, we need to find out  
16 what the situation is, and we need to secure the inmates that  
17 are involved.

18 Q. Can you please explain to the jury what happens during an  
19 institutional search?

20 A. Institutional search, the officers are briefed before we go  
21 into the housing area. We let them know why we're going into  
22 the housing area. Once we enter the housing area, the male  
23 inmates -- I'm sorry -- the male officers strip-search the male  
24 inmates. And the female officers and captains conduct searches  
25 of the common areas.

J94Qmcc6

Bell - Cross

1 Q. Would a female captain be present if a male inmate is being  
2 strip-searched?

3 MR. LICHTMACHER: Objection.

4 THE COURT: Thank you.

5 Can you please rephrase the question?

6 Q. Are there any female captains present when a male inmate is  
7 being strip-searched?

8 MR. LICHTMACHER: Objection. Same objection.

9 THE COURT: You can answer the question.

10 A. No, ma'am.

11 Q. On February 19, 2015, did you hear anything when the  
12 institutional search was being conducted?

13 A. Yes, I heard a commotion coming from the back of the tier.

14 Q. Can you describe to the jury what you mean by commotion?

15 A. I heard the officers saying "stop resisting, stop  
16 resisting."

17 Q. And where were you when you heard the commotion?

18 A. I was in the front of the tier.

19 Q. Are you familiar with the tier?

20 A. I am.

21 Q. How familiar are you with the tier?

22 A. Very familiar.

23 MS. GOYKADOSH: At this point I would like to show the  
24 witness only a photo of the tier.

25 Q. Captain Bell, do you see what's on the screen in front of

J94Qmcc6

Bell - Cross

1 you?

2 A. I do.

3 Q. Is this photo a fair and accurate representation of the  
4 tier in the housing area?

5 A. Yes.

6 MS. GOYKADOSH: Your Honor, at this point, I would  
7 like to show this photo to the jury for demonstrative purposes.

8 THE COURT: Thank you.

9 Counsel?

10 MR. LICHTMACHER: No objection.

11 THE COURT: Thank you. What's the exhibit reference,  
12 Counsel.

13 MS. GOYKADOSH: It's Exhibit C, your Honor.

14 THE COURT: Thank you. Please proceed.

15 Q. Captain Bell, do you see this photo?

16 A. I do.

17 Q. Where was plaintiff's cell?

18 A. Back here somewhere.

19 Q. So you --

20 A. In this area.

21 Q. So you drew a circle a little bit past the 14. Is that  
22 right?

23 A. Yes.

24 MS. GOYKADOSH: Thank you.

25 At this point your Honor, I'd like to show the witness

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Bell - Cross

1 another exhibit, please.

2 THE COURT: Thank you.

3 Q. Captain Bell, do you see what's on the screen in front of  
4 you?

5 A. I do.

6 Q. And what is this?

7 A. This is the B gate.

8 Q. Are you familiar with the area depicted in this photo?

9 A. I am.

10 Q. Is this photo a fair and accurate representation of the B  
11 gate as you describe it?

12 A. Yes.

13 MS. GOYKADOSH: Your Honor, at this point I would like  
14 to show this exhibit, which is Defendant's Exhibit E, to the  
15 jury for demonstrative purposes.

16 MR. LICHTMACHER: No objection.

17 THE COURT: Thank you. Please proceed.

18 Q. Captain Bell, can you please point out to the jury where on  
19 this photo you were on February 19, 2015?

20 A. (Indicating)

21 Q. So is that close by to the post?

22 A. Yes.

23 Q. And was plaintiff -- where was plaintiff's cell in relation  
24 to that?

25 A. (Indicating)

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Bell - Cross

1 Q. How far of a distance would you describe that to be?

2 A. It would be from, again, here to that black chair  
3 (indicating).

4 Q. That's what you previously described from the witness stand  
5 to the chair in the back of the well?

6 A. Yes, ma'am.

7 Q. Thank you. What are the lighting conditions inside of the  
8 tier?

9 A. They're not very good. They're horrible.

10 Q. Are they similar to what's depicted in this photograph?

11 A. Yes.

12 Q. Thank you. Why were you in the front of the tier?

13 A. Because the male inmates were getting strip-searched.

14 Q. Was there any other reason why you were in the front of the  
15 tier?

16 A. I had to supervise the female officers that was searching  
17 the common areas.

18 Q. When you heard this commotion, what did you do?

19 A. I told -- I yelled to the officers, "secure your inmates.  
20 Secure your inmates."

21 Q. What does it mean to secure an inmate?

22 A. It means that you either have to put the inmate back into  
23 his cell or you have to get them away from the situation that's  
24 going on.

25 Q. Why is that important to do?



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Bell - Cross

1 A. Because you don't want them to get involved in what's going  
2 on and potentially get hurt.

3 Q. Did you do anything else?

4 A. Once I told the other officers to secure the inmates, I  
5 observed Officer Emmanuel walking towards me.

6 Q. How long after you heard the commotion did you observe  
7 Officer Emmanuel walking towards you?

8 A. Seconds.

9 Q. Was Officer Emmanuel with anyone?

10 A. Yes.

11 Q. Who was he with?

12 A. He had inmate McCurdy.

13 Q. And what did you do when you saw Officer Emmanuel with  
14 Mr. McCurdy?

15 A. I instructed Officers Barr and Roberts to -- I told  
16 Emmanuel to relinquish the inmate to those two officers.

17 Q. And why did you do that?

18 A. Because Emmanuel was involved in the use of force, and he's  
19 not allowed to interact with him now.

20 Q. And what did you tell the two officers that plaintiff was  
21 handed off to?

22 A. "Take him to the intake."

23 Q. Why did you instruct them to take him to the intake?

24 A. All inmates who are involved in any type of incident, use  
25 of force or otherwise, are taken to the intake so they can get

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Bell - Cross

1 medical attention from there.

2 Q. Did you at any point notice other inmates resisting the  
3 search?

4 A. No.

5 Q. Did you notice any other inmates fighting with corrections  
6 officers?

7 A. No.

8 Q. At any point, did you direct Officer Mitchell to punch  
9 plaintiff?

10 A. No.

11 Q. At any point, did you direct Officer Mitchell to kick  
12 plaintiff?

13 A. No.

14 Q. At any point, did you direct Officer Mitchell to stomp on  
15 plaintiff?

16 A. No.

17 Q. Did you ever see Officer Mitchell kick plaintiff?

18 A. I wasn't in the area, no.

19 Q. Did you ever see him punch plaintiff?

20 A. No.

21 Q. Did you have any interaction with plaintiff on February 19,  
22 2015?

23 A. No.

24 MS. GOYKADOSH: Your Honor, may I have a moment to  
25 confer with my co-counsel, please?

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Bell - Cross

1 THE COURT: Yes, please take your time, counsel.

2 (Pause)

3 MS. GOYKADOSH: Two very brief questions, your Honor,  
4 if I may.

5 THE COURT: That's fine. Please proceed.

6 MS. GOYKADOSH: Thank you.

7 BY MS. GOYKADOSH:

8 Q. Why were the female corrections officers searching the  
9 common areas?

10 A. Because they're not allowed to be present when male inmates  
11 are being strip-searched.

12 Q. Was there any other reason why they were searching the  
13 common areas?

14 A. We were looking for a weapon because there was a slashing,  
15 so we had to search.

16 Q. Thank you. And plaintiff's counsel suggested that you  
17 might have some relationship with plaintiff. Would you ever  
18 have a relationship with the plaintiff in this case?

19 MR. LICHTMACHER: Objection to "would."

20 THE COURT: Thank you.

21 Counsel, can you please rephrase the question?

22 Q. Did you ever have a relationship with the plaintiff?

23 A. No, ma'am.

24 MS. GOYKADOSH: Thank you.

25 Your Honor, I have no further questions, but I do

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Bell - Redirect

1 reserve the right to call this witness for rebuttal if  
2 necessary.

3 THE COURT: Thank you.

4 Counsel for plaintiff, any further questions for this  
5 witness?

6 MR. LICHTMACHER: Yes. Just a few.

7 REDIRECT EXAMINATION

8 BY MR. LICHTMACHER:

9 Q. So, let me understand this, you saw McCurdy directly after  
10 the incident?

11 A. I saw the inmate walking down the tier, yes.

12 Q. OK. Which view did you see of him?

13 A. I didn't hear you.

14 Q. Well, how did you know it was McCurdy?

15 A. I know who the inmate is.

16 Q. OK. So you saw him. You saw his face?

17 A. I saw the inmate walking towards me, yes.

18 Q. Walking towards you. I'm going to hand this witness one,  
19 two, three, four exhibits marked for identification as 11  
20 through 14 not yet in evidence, your Honor.

21 Please take a moment and look at these four Exhibits  
22 11, 12, 13 and 14. Do you know the people in those exhibits?

23 A. I know some of the officers, yes.

24 Q. And which officers -- not yet. In which exhibit do you  
25 know an officer?

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Bell - Redirect

1 A. All of them.

2 Q. All of them. And which officers do you know?

3 A. Roberts and Barr.

4 Q. And do you know who the inmate is? I take it that's an  
5 inmate with them, correct?

6 A. Yes.

7 Q. What inmate is that?

8 A. McCurdy.

9 Q. Is that the way he looked when you saw him?

10 A. I didn't see him this way.

11 Q. Well, you said he was walking towards you, correct?

12 A. I saw him walking down the tier, yes.

13 Q. You said you saw him walking towards you, correct?

14 A. I saw him walking down the tier, yes.

15 Q. Did you or did you not just testify under oath that you saw  
16 him walking towards you? If you'd like, we can have a  
17 read-back.

18 MS. GOYKADOSH: Objection.

19 THE COURT: Thank you. Can you just rephrase the  
20 question, please, Counsel?

21 Q. Sure. You testified a few moments ago that you saw him  
22 walking towards you, correct?

23 A. Officer Emmanuel, he was walking down the tier, yes.

24 Q. I'm sorry. I didn't hear what you said.

25 A. He was walking down the tier with Officer Emmanuel after

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Bell - Redirect

1 the incident, yes.

2 Q. Toward you, correct?

3 A. Yes.

4 Q. So you got to see what he looked like at that point,  
5 correct?

6 A. I saw him walking down the tier. I did not see him like  
7 this.

8 Q. When you say you didn't see him like this, what do you  
9 mean?

10 MS. GOYKADOSH: Objection.

11 THE COURT: I'm sorry. Counsel, can you please  
12 rephrase the question?

13 MR. LICHTMACHER: Sure.

14 Q. What do you mean by you didn't "see him like this"?

15 MS. GOYKADOSH: Objection.

16 THE COURT: I'm sorry. Can you please rephrase the  
17 question. I understand the question relates to the documents  
18 in front of the witness.

19 MR. LICHTMACHER: Sure.

20 Q. You saw him, according to you, walking towards you, and you  
21 knew the officers with him and you knew it was him. Is that  
22 all correct?

23 A. Yes.

24 Q. And in all those documents, did you know -- did they look  
25 like him to you?

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Bell - Redirect

1 MS. GOYKADOSH: Objection.

2 THE COURT: Thank you.

3 Can you please rephrase the question?

4 MR. LICHTMACHER: Sure.

5 Q. Is it true that Mr. McCurdy is in all four of those  
6 documents?

7 A. Yes.

8 Q. Is it also true -- well, you just testified a few moments  
9 ago that you know officers in all of those documents, correct?

10 A. Yes.

11 Q. And you saw him -- how long after you heard the commotion  
12 did you see him walking towards you?

13 A. It was seconds after the commotion.

14 MR. LICHTMACHER: Your Honor, I move these into  
15 evidence. This is Plaintiff's 11, 12, 13 and 14. And if you  
16 need a sidebar, I'd love to have one.

17 MS. GOYKADOSH: Objection, your Honor.

18 THE COURT: I'd be happy to discuss with counsel at  
19 sidebar if you'd like. Please come forward.

20 (Continued on next page)

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Bell - Redirect

1 (At the side bar)

2 THE COURT: Thank you. Go ahead. There's an  
3 objection, counsel?

4 MS. GOYKADOSH: I believe for the same reasons why  
5 these photos could not be admitted through Corrections Officer  
6 Mitchell, they cannot be admitted through Captain Bell as well.  
7 She's testified that she did not see him like that. This is --  
8 as Corrections Officer Mitchell testified, this hallway is not  
9 the same tier where she was at. There's absolutely no  
10 testimony that he was walking towards her just like that, the  
11 same way it's depicted in the photos. She did testify that he  
12 was walking towards her, but she did not say anything about him  
13 looking like that. In fact, she actually said the opposite of  
14 that, so...

15 THE COURT: Thank you.

16 So, Counsel, just to be clear, my recollection of the  
17 testimony is that the witness has testified that she did not  
18 see the plaintiff like that. We heard from the testimony of  
19 Officer Mitchell previously that that is not the hallway in the  
20 tier, it does not appear to be the hallway in the tier, and the  
21 witness has testified that he saw her -- sorry -- that she saw  
22 him walking toward her in the hallway in the tier.

23 MR. LICHTMACHER: Seconds -- I didn't mean to cut you  
24 off, but seconds after the incident.

25 THE COURT: Thank you.



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Bell - Redirect

1 Can I have a proffer of this? Is this a picture of  
2 the hallway and the tier?

3 MR. LICHTMACHER: Well, this is what it's purported to  
4 be.

5 MS. GOYKADOSH: Your Honor, if I --

6 THE COURT: She said she knows the officers who were  
7 escorting him.

8 MS. GOYKADOSH: Just to make things a little quicker.  
9 Just my own limited experience with DOC, this is not the tier.  
10 The tier is a separate hallway just for the housing area. This  
11 is a hallway outside of the tier, so it's not the same place.

12 THE COURT: Thank you. It's apparent that that is not  
13 the same hallway she testified about seeing. There are no  
14 cells, and the illumination is substantially different.

15 MR. LICHTMACHER: The same person and the same people  
16 with him, your Honor, and she saw him seconds after the  
17 incident, and I doubt they would have taken him -- and look at  
18 the time 2:39:20. The incident is alleged to have gone down at  
19 approximately 2:30. This is directly after the incident, she  
20 saw him walking towards him. I think she's already  
21 authenticated this.

22 THE COURT: Thank you. I'm sustaining the objection.  
23 The testimony is that she saw him walking towards her in a  
24 hallway that is not the hallway depicted in these images. The  
25 fact that she -- she also testified that she did not see him

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Bell - Redirect

1 like this, referring to the way in which he is represented in  
2 the photos. As a result, I don't believe that she can lay an  
3 adequate foundation for the introduction of these exhibits, and  
4 so the objection is sustained.

5 MS. GOYKADOSH: Thank you, your Honor.

6 MR. LICHTMACHER: I would like to try a little more to  
7 lay a foundation that will please the Court, your Honor, and I  
8 think I can.

9 THE COURT: Thank you. If you'd like, you should feel  
10 free. I would like to ask for a proffer because at this point  
11 we've heard objective testimony by the witness that she did not  
12 see him like that.

13 MS. GOYKADOSH: Yeah, well, that's kind of impeachable  
14 because how he did he get like that probably seconds after she  
15 alleges she saw him? With the huge knot on his head and he  
16 looks terrible. Let me ask how far down the hallway -- how far  
17 it was from the original incident? How far that is from the  
18 clinic? Does she know this particular hallway? Do officers  
19 just, you know, dally with prisoners after they're -- when  
20 they're on their way to the clinic or do they bring them  
21 directly there? If I ask it that way, that might be an  
22 adequate foundation, your Honor.

23 THE COURT: Thank you. I don't mind if you ask  
24 questions about the mobility of the defendant following the  
25 incident, but she's already testified she hasn't seen these

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Bell - Redirect

1 images or she did not see him like that after the incident.  
2 Further inquiry regarding these pictures from her therefore  
3 seems to be a waste of time.

4 MR. LICHTMACHER: If I may, your Honor, under the  
5 criteria that you just laid out, any defendant who beats the  
6 heck out of somebody can see a picture with a bloody face --  
7 and I'm not trying to trump the Court, I mean that, but any  
8 defendant who sees a defendant's picture with a bloody face and  
9 says, "Gee, I didn't see him like that," can't commit. So let  
10 me try to connect it temporally, connect it in terms of  
11 distance and what the officers' obligations were afterward and  
12 where they were going, and then possibly there will be enough  
13 to connect it into evidence.

14 MS. GOYKADOSH: Your Honor, we would object to this  
15 potential line of questioning under Rule 403. I believe it  
16 wastes the jury's time.

17 MR. LICHTMACHER: I haven't wasted much of the jury's  
18 time, your Honor. In fairness, I'm trying to be to the point.

19 THE COURT: Thank you. I will allow a few more  
20 questions.

21 Counsel, at this point I don't see how this is going  
22 to be rehabilitated. Fundamentally, I understand the basic  
23 concern. However, that's easily solved by work by counsel to  
24 ensure that the witness is capable of authenticating the  
25 relevant documents here. We have a particular issue why

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Bell - Redirect

1 plaintiff has made himself unavailable, but there are other  
2 vehicles to authenticate exhibits.

3 MR. LICHTMACHER: All right.

4 THE COURT: Good. So let's proceed.

5 (Continued on next page)

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Bell - Redirect

1 (In open court)

2 BY MR. LICHTMACHER:

3 Q. So when Mr. McCurdy was walking towards you, did you see  
4 any injuries on him?

5 A. No, sir. The situation was chaotic.

6 Q. Well, that's not what I asked you. He was walking towards  
7 you. You were able to see his face, I presume, when he was  
8 walking towards you, correct?

9 MS. GOYKADOSH: Objection.

10 A. The situation was chaotic, sir.

11 THE COURT: Can you rephrase the question, please,  
12 Counsel?

13 MR. LICHTMACHER: Sure.

14 Q. You indicated already that Mr. McCurdy was walking towards  
15 you, and you also indicated that you were able to see that it  
16 was him. Am I correct so far?

17 A. Yes.

18 Q. So I guess you saw his face, correct?

19 MS. GOYKADOSH: Objection.

20 THE COURT: Thank you. Can you please rephrase the  
21 question?

22 MR. LICHTMACHER: Sure.

23 Q. When he was walking towards you, was anybody standing in  
24 front of him hiding you from or blocking you from being able to  
25 see that it was him?

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Bell - Redirect

1 MS. GOYKADOSH: Objection.

2 THE COURT: Thank you.

3 You can answer the question.

4 A. There were officers all over the tier, so it was a chaotic  
5 situation. It wasn't just him and officers on the tier.

6 Q. OK. When officers were there, and when he was walking  
7 towards you, at any point were you able to see his face?

8 A. I was --

9 MS. GOYKADOSH: Objection.

10 THE COURT: Thank you.

11 You can answer the question.

12 A. I wasn't concentrating on his face. We were trying to get  
13 him out of the area because the situation was chaotic.

14 Q. By the way, was the scalpel ever found on Mr. McCurdy that  
15 day?

16 MS. GOYKADOSH: Objection.

17 THE COURT: Thank you.

18 You can answer the question.

19 A. I have no knowledge of that.

20 Q. But you were captain of security there?

21 MS. GOYKADOSH: Objection.

22 THE COURT: Thank you.

23 Can you please rephrase the question, Counsel?

24 MR. LICHTMACHER: Sure.

25 Q. I think you indicated you were captain of security at that

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Bell - Redirect

1 time, correct?

2 A. Of AMKC, yes.

3 Q. And as captain of security, it would be important to know  
4 what weapons would have been recovered in the facility,  
5 correct?

6 MS. GOYKADOSH: Objection.

7 THE COURT: Thank you.

8 You can answer the question.

9 A. We recovered a scalpel that day, yes.

10 Q. And did you recover it from Mr. McCurdy?

11 A. No.

12 Q. You did not, OK. When was the scalpel recovered, if you  
13 remember?

14 MS. GOYKADOSH: Objection.

15 THE COURT: Thank you. Sustained.

16 Q. Now, so as you sit here today, you understand that  
17 Mr. McCurdy was not the person with the scalpel at the time the  
18 search went on, correct?

19 MS. GOYKADOSH: Objection.

20 THE COURT: Thank you. Sustained.

21 Q. What, if anything, leads you to believe that Mr. McCurdy  
22 was the guy with the scalpel if it wasn't recovered from him?

23 MS. GOYKADOSH: Objection.

24 THE COURT: Thank you. Sustained.

25 Q. What, if any, weapons were recovered from Mr. McCurdy that

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Bell - Redirect

1 day?

2 MS. GOYKADOSH: Objection.

3 THE COURT: Thank you. You can answer the question.

4 A. None that day.

5 Q. Now, as head of security, when you hear a commotion, do you  
6 have an obligation to investigate what's happening?

7 MS. GOYKADOSH: Objection.

8 THE COURT: Thank you. Sustained.

9 Q. What is your obligation as head of security when you hear a  
10 commotion in the building?

11 MS. GOYKADOSH: Objection.

12 THE COURT: Thank you. Sustained. I understand it's  
13 beyond the scope. You may proceed.

14 Q. What, if anything, did you do that day when you heard the  
15 commotion?

16 MS. GOYKADOSH: Objection.

17 THE COURT: Thank you. You can answer the question.

18 A. I instructed the officers to secure their inmates.

19 Q. And where, if anywhere, did you go after you gave that  
20 instruction?

21 A. I didn't go anywhere.

22 Q. You stood right where you were?

23 A. Yes.

24 Q. You stayed right there?

25 A. I stayed on the tier, yes.



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Bell - Redirect

1 Q. And were you inquiring as to what was happening?

2 MS. GOYKADOSH: Objection.

3 THE COURT: Thank you.

4 You can answer the question.

5 A. No.

6 Q. As head of security -- withdraw that. You were wearing  
7 boots that day, you indicated, I take it, correct?

8 MS. GOYKADOSH: Objection.

9 THE COURT: Thank you.

10 Can you rephrase the question, please, Counsel?

11 Q. What, if anything, were you wearing on your feet that day?

12 A. Boots.

13 Q. At any point in time did you become aware that Mr. McCurdy  
14 became injured that day?

15 MS. GOYKADOSH: Objection.

16 THE COURT: Thank you.

17 You can answer the question.

18 A. We learned later that he went to the clinic.

19 Q. Now, when you saw him walking, I think you said -- I don't  
20 want to misquote you -- you handed him off to two other  
21 officers, correct?

22 A. Yes.

23 Q. What other two officers did you hand him off to?

24 A. Barr and Roberts.

25 Q. For what purpose?

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Bell - Redirect

1 A. Officer Emmanuel was involved in the use of force with him,  
2 he's not allowed to escort him to the intake.

3 Q. Why was Mr. McCurdy being escorted to the intake?

4 A. He was involved in an incident.

5 Q. When you're involved in an incident, are you also brought  
6 to a clinic?

7 A. From the intake, yes.

8 Q. So the clinic and the intake are somehow synonymous?

9 MS. GOYKADOSH: Objection.

10 THE COURT: Thank you.

11 Can you rephrase the question?

12 MR. LICHTMACHER: Sure.

13 Q. What, if any, relationship does intake have with the  
14 clinic?

15 MS. GOYKADOSH: Objection.

16 THE COURT: Thank you.

17 You can answer the question.

18 A. An inmate that's involved in an incident goes to the intake  
19 first, and then they are escorted to the clinic for medical  
20 attention.

21 Q. And if the inmate is not injured after he goes to intake,  
22 is he still escorted for medical attention?

23 A. Yes.

24 Q. OK. And if the inmate is not injured, is he still escorted  
25 to an outside hospital?

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Bell - Redirect

1 A. If the inmate is not injured?

2 Q. Yeah.

3 A. I have no medical -- I can't answer that. That's up to the  
4 medical staff.

5 Q. So then is it fair to say -- what I'm hearing from you is  
6 if the medical staff decides he's injured, they send him to an  
7 outside hospital. Is that correct? Is that your  
8 understanding?

9 MS. GOYKADOSH: Objection.

10 THE COURT: Thank you. Sustained.

11 Q. What's the criteria for an inmate to go to an outside  
12 hospital?

13 MS. GOYKADOSH: Objection. Beyond the scope.

14 THE COURT: Thank you. Arguably asked and answered.

15 Counsel, I will permit a response.

16 You can answer the question.

17 A. I'm not medical.

18 THE COURT: Thank you.

19 Q. Is it your understanding that he has to be injured in order  
20 to be taken to an outside hospital?

21 MS. GOYKADOSH: Objection.

22 THE COURT: Thank you. Sustained.

23 Q. Inmates at Rikers, can they just ask to go to the hospital  
24 and they get brought there?

25 MS. GOYKADOSH: Objection.

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Bell - Redirect

1 THE COURT: Thank you.

2 You can answer the question.

3 A. Inmates are afforded sick call every day.

4 Q. I asked you something a little different, but thank you for  
5 that.

6 So you're an inmate at Rikers. Can you say, "I need  
7 to go to the hospital, bring me to the hospital." On his word  
8 alone, does he get brought to the hospital?

9 A. Not on his word alone, no.

10 Q. In fact, there has to be some kind of medical evidence of  
11 an illness, correct?

12 MS. GOYKADOSH: Objection.

13 THE COURT: Thank you.

14 You can answer the question if you know the answer.

15 A. I have no idea.

16 MR. LICHTMACHER: No more questions.

17 THE COURT: Thank you.

18 Counsel for defendants.

19 MS. GOYKADOSH: Nothing further, your Honor.

20 However, we do have a -- nothing further for this  
21 witness, your Honor.

22 THE COURT: Good.

23 Thank you very much, Captain Bell, for your testimony.

24 You can step down.

25 THE WITNESS: Thank you.

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Bell - Redirect

1 (Witness excused)

2 MR. LICHTMACHER: I'm sorry, but I need a sidebar.

3 THE COURT: That's fine. So why don't we take another  
4 very short break.

5 Ladies and gentlemen, please bear with us. We'll take  
6 about a ten minute break. Then I will ask you to come back in.  
7 I've committed to get you out of here by 3:30 and I will today.

8 During the recess of this break, don't discuss the  
9 case among yourselves. Don't do any research about the case.  
10 Don't discuss the case with anyone else. I'll see you back  
11 here shortly. Thank you.

12 (Recess)

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Bell - Redirect

1 (Jury not present)

2 THE COURT: Just to note that the witness testified  
3 that she did not see plaintiff's face.

4 Let's talk about what we're doing now. Counsel for  
5 plaintiff, do you have any additional evidence that you are in  
6 a position to offer at this time?

7 MR. LICHTMACHER: My position to offer was well posed,  
8 your Honor.

9 THE COURT: I'm sorry?

10 MR. LICHTMACHER: That was well posed, your Honor,  
11 position to offer.

12 Do I have additional evidence? Yes. Am I in a  
13 position to pose it? No. That's why I'm going to make an  
14 application.

15 THE COURT: Thank you.

16 MR. LICHTMACHER: My application is that you give me  
17 until tomorrow morning to attempt to procure the plaintiff's  
18 attendance at trial, which I'm -- to be totally honest, I am  
19 not optimistic about, nor do I know how useful he'd be without  
20 having heard the testimony. But I'd like to have the  
21 opportunity if he can show up tomorrow morning. If he doesn't  
22 show up, I'll obviously, you know, rest at that time.

23 THE COURT: Thank you.

24 MS. GOYKADOSH: Your Honor, may I be heard on that  
25 issue?

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Bell - Redirect

1 THE COURT: Yes, please.

2 MS. GOYKADOSH: We would oppose plaintiff's  
3 application. Mr. McCurdy was brought here today. He did  
4 refuse to come and testify. It's unclear why one additional  
5 day might make a difference. However, it is one additional day  
6 that these officers are forced to go through this trial. We  
7 believe that if Mr. McCurdy did want to come here and  
8 participate in his own trial, he certainly had an opportunity  
9 to do so.

10 We think that the Court went through great efforts to  
11 make sure that Mr. McCurdy was here today, and yet he refused  
12 to come. A message was conveyed to him through his own counsel  
13 about the possibility of what could happen, and he chose to  
14 take that risk. So he should now have to suffer the  
15 consequences of his own actions.

16 THE COURT: Thank you. Give me just a moment, if I  
17 can.

18 I would like to give the parties a little bit more  
19 information about what I know regarding Mr. McCurdy's conduct.  
20 Again, this is not complete or comprehensive. I am summarizing  
21 briefly information that was conveyed to me directly through my  
22 clerk through the marshals, but let me give you a brief summary  
23 of what I understand to have happened.

24 So what I understand to have happened is that the  
25 deputy marshal arrived to produce Mr. McCurdy; that he spoke

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Bell - Redirect

1 with Mr. McCurdy and explained that he, per USMS and BOP  
2 policy, he has jewelry, sunglasses, cone, rings, etc.  
3 Apparently, the plaintiff raised his voice and cursed at staff  
4 and stated that he refused to go to court; that he would like  
5 to go back to Rikers.

6 Mr. McCurdy asked to use the rest room. He was  
7 released from the holding cell and allowed to go to a cell in  
8 the rest room. Afterwards McCurdy apparently told BOP staff  
9 that he was not going back to the holding cell, and then he  
10 started to threaten staff saying he was going to fight them  
11 because he was not going back into the holding cell or into  
12 court.

13 The deputy, as I understand it, together with the  
14 supervisor -- I should say the deputy tried to explain to  
15 Mr. McCurdy regarding the information that we discussed  
16 earlier, and I believe the content of our agreed-upon  
17 communication. Apparently, McCurdy kept threatening to fight  
18 the staff. The transport team was able to restrain him without  
19 incident and he was escorted from the facility.

20 So that's the information that I have. It does not  
21 augur well for his appearance here tomorrow morning. I want to  
22 make sure that you have basically all the information that I  
23 have. I just summarized an email that I received earlier.

24 So all of that said, we've got work to do. I am  
25 inclined to grant the plaintiff's request and to give him the



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Bell - Redirect

1 opportunity to have Mr. McCurdy produced by tomorrow before he  
2 rests. I'm not optimistic given the information that I have.  
3 I recognize it is something of an imposition on the defendants,  
4 but at the same time plaintiff has been attempting to pursue  
5 this lawsuit for some period of time, and I want to give him  
6 another opportunity to appear here.

7 Again, I'm not sanguine about the prospects of that,  
8 but I think that it would be reasonable to provide him that  
9 opportunity.

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1 THE COURT: So my inclination is to grant plaintiff's  
2 request and to take up at 9 a.m. tomorrow what we will do if  
3 he's not here at that time.

4 MR. LICHTMACHER: Your Honor?

5 THE COURT: Yes.

6 MR. LICHTMACHER: I would like to make a further  
7 application.

8 THE COURT: Yes.

9 MR. LICHTMACHER: As I'm going to attempt to -- I  
10 doubt I can jump through all these hoops. I doubt I can get it  
11 done. But if we could convene at 9:30, might give me some  
12 extra time to at least have the possibility.

13 As your Honor has mentioned, we've been pursuing this  
14 for years. Finally got our day in court. And my plaintiff  
15 undoubtedly is responsible. Perhaps, however, with him able to  
16 leave his jewelry in Rikers, he'll be more cooperative about  
17 coming in.

18 THE COURT: Thank you. It's very hard to tell.

19 MR. LICHTMACHER: I'm not optimistic; I won't lie to  
20 you.

21 THE COURT: Thank you.

22 MR. LICHTMACHER: I am not optimistic. But, you know,  
23 under the circumstances -- and actually, defendants had to be  
24 here anyway, until tomorrow, because we're ending at 3:30, and  
25 it would have continued through then. I don't think there's

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1 any prejudice.

2 THE COURT: Good. Thank you.

3 So I'm going to deny the request to start at 9:30  
4 rather than at 9. I've committed to the jurors to begin every  
5 day at 9:15, and I don't believe that there's a substantial  
6 difference between the information that we'll have at 9:15 as  
7 opposed to 9:30.

8 MS. GOYKADOSH: Your Honor, I just have a question  
9 with regards to timing.

10 THE COURT: Yes.

11 MS. GOYKADOSH: Just logistically speaking.

12 THE COURT: Please.

13 MS. GOYKADOSH: Today, my understanding is Mr. McCurdy  
14 didn't arrive until past 9. I don't know if that has to do  
15 with the busing from GRVC. I don't know why he wasn't here  
16 until after 9 today, and I'm just curious how that's going to  
17 impact tomorrow. If indeed he is on his way but the bus or the  
18 means of transportation does not arrive here until whatever  
19 time, are we going to just wait until he gets here and then see  
20 what happens? I just want to know what we're going to do.

21 THE COURT: Thank you.

22 I can't provide a complete answer to that question.  
23 And unfortunately I think it will very much vary based on the  
24 circumstances. At this point my expectation is that if  
25 Mr. McCurdy is not here and prepared to testify at 9:15 when

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1 the jury is ready to hear testimony, then the plaintiff will be  
2 required to rest, lacking additional evidence, as I understand  
3 it. As a consequence of plaintiff's failure to appear today,  
4 to the extent that he fails to appear tomorrow because he  
5 failed to accept the transfer to MCC and to come to court  
6 today, that remains the consequence of his decision today.

7 Now I only leave some leeway here because if the  
8 information is that Mr. McCurdy will be here, you know,  
9 relatively early in the morning, then as you can see, I'm  
10 trying to express some flexibility about what we would do. I  
11 don't want to deprive him of the opportunity to put on a case.  
12 If we know that he's on the way and it's just a question of  
13 waiting for a couple of hours, I think that would be more than  
14 appropriate. It would be the fair and equitable approach.

15 So my expectation is at this point that if he is not  
16 here at 9:15 that we will, unfortunately, as a result of his  
17 choice, be left with the plaintiff's case as it is. If that's  
18 not the case, then we'll have to deal with the facts as they  
19 are at the time.

20 So I hope that's helpful guidance. Unfortunately I  
21 can't anticipate what the circumstances will be and therefore I  
22 can't tell you exactly how I expect to respond in all  
23 circumstances.

24 Counsel for plaintiff, do I take from you that you  
25 have no evidence at this point beyond the testimony of

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1 Mr. McCurdy? Because if so, I would release the jurors for the  
2 day now. We would need to then take some time to engage in a  
3 conversation about what I should tell the jury in the event  
4 that he fails to appear. I agree that we need to craft a  
5 statement that's appropriate, given my prior statements to them  
6 regarding how they should view his absence. We began a  
7 conversation on that earlier, and I would like to complete that  
8 conversation and develop language that is informed by the  
9 parties' arguments about what I should best tell the jury in  
10 that circumstance.

11 So that's what I'd like to ask the parties to engage  
12 in now, but because I'm respectful of the jury's time, I'd just  
13 like to ask, is there anything else that we need the jury for  
14 today? The gating question for that, Mr. Lichtmacher, is  
15 whether there is any evidence beyond Mr. McCurdy's testimony  
16 that the plaintiff seeks to introduce here.

17 MR. LICHTMACHER: Well, there are documents that we  
18 can introduce, but the Court has made that readily apparent,  
19 when we wanted to do that -- and I would keep my objection  
20 to -- 11, 12, 13, and 14. That's all been properly  
21 authenticated, your Honor, but I understand the Court's ruling.  
22 I would seek to enter them again with Mr. McCurdy to come in,  
23 as I would seek to enter Document No. 15 if he were to come in,  
24 and I understand I can't do it without him --

25 THE COURT: Thank you.

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1 MR. LICHTMACHER: -- under these circumstances. So  
2 the statement was correct but incomplete.

3 THE COURT: Good. Thank you.

4 Fine. I've already made a record regarding my reason  
5 not to admit those records. Among other things, the witness  
6 testified that she did not see him looking in the way that he  
7 was depicted in the photograph, therefore could not state that  
8 they're accurate photographs, the images of him at the time of  
9 the incident.

10 So with that, what I propose to do, counsel, is to  
11 bring in the jury, I'll relieve them for the day, then we'll  
12 talk about what we'll do in the event that Mr. McCurdy is not  
13 produced tomorrow in terms of what I should tell them, in terms  
14 of how they will consider the evidence, assuming that the case  
15 is put to them following any motions that may be brought by the  
16 defense.

17 MR. SIDDIQI: Your Honor?

18 THE COURT: Yes.

19 MR. SIDDIQI: Very quickly, I have an application I'd  
20 like to make after the jury leaves for the day.

21 I would just like to express for the record that our  
22 preference is that the jury is instructed with regards to  
23 Mr. McCurdy's absence today before they're dismissed and, if  
24 they are not instructed today, that any instruction would refer  
25 to Mr. McCurdy's absence today. Because the Court in the

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1 morning told them that it was through no fault of his own.

2 That was no longer true as the day progressed.

3 THE COURT: Thank you.

4 That's denied. We'll have the opportunity to develop  
5 a statement to read to the jury. I would like to be respectful  
6 of the jurors' time. It's 3:15 now. If we take the time to  
7 develop such a statement before I excuse the jury for the day,  
8 I expect that we will not meet the schedule that I've committed  
9 to. As a result, I'm going to deny the request to make any  
10 statement to the jury prior to their departure today. That's  
11 because I want to make sure that we have an opportunity to  
12 develop an appropriate statement, and I do not want to hold up  
13 the jury while we do so. I think that the marginal benefit of  
14 making a statement to the jury today as opposed to tomorrow  
15 morning is very small, and as a result, I believe it's  
16 appropriate for us to take the time to develop a statement  
17 rather than asking to make a statement in prompt order without  
18 having the opportunity to develop it or to disrespect the time  
19 of our volunteer citizens who are here doing their civic duty.

20 So for those reasons, I'm denying that request.

21 MR. SIDDIQI: Thank you for letting us make our  
22 record, your Honor.

23 THE COURT: Thank you. Good.

24 So counsel, if you'd like to make a further record,  
25 please do. What's the incremental prejudice associated with

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1 waiting to develop an appropriate statement and to deliver it  
2 to the jury in the morning?

3 MR. SIDDIQI: No, your Honor. I have no further  
4 record to make. I thank the Court for its indulgence so far.

5 THE COURT: Thank you. Good.

6 Ms. Nelson, would you please bring in the jury.

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1 (Jury present)

2 THE COURT: Thank you.

3 Counsel, you can be seated.

4 So ladies and gentlemen of the jury, I've told you  
5 earlier that sometimes these breaks will actually help the case  
6 move along more efficiently. Here, what I'm going to tell you  
7 is that you've heard the last of the evidence that you're going  
8 to hear today. So I'm going to excuse you for the day now.  
9 Please be back tomorrow morning at 9 a.m. All of you were very  
10 prompt yesterday. We will try to start as close to 9:15 as  
11 possible; my hope is no later than 9:15.

12 So during this recess, as before, please don't discuss  
13 the case with each other, don't communicate about the case with  
14 anyone else by any means, and don't do any research about the  
15 case or anyone or anything to do with it.

16 I'll see you all tomorrow morning. So thank you very  
17 much.

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1 (Jury not present)

2 THE COURT: Thank you. Counsel, you can be seated.

3 So let's work on the question of what instruction I  
4 should give the jury regarding Mr. McCurdy's absence in these  
5 circumstances. To date, as the parties know, I've instructed  
6 the jury I believe thrice that they should not hold  
7 Mr. McCurdy's absence against him, that it was as a result of  
8 circumstances that were no fault of his own. I made that  
9 comment, if my recollection serves, twice during the course of  
10 jury selection and then again once during the beginning of our  
11 trial day today.

12 So counsel, of course that's no longer true. Now  
13 Mr. McCurdy is absent not through no fault of his own but  
14 because of his fault, and I recognize a legitimate concern that  
15 the subsequent part of that instruction -- namely, that the  
16 jury is not to take his absence against him -- could be  
17 confusing to the jury, perhaps mislead them, to the extent that  
18 it leads them to believe that they should not take the absence  
19 of any testimony or evidence from him against him, which I do  
20 not believe would be the appropriate message.

21 So what I'd like to do is engage in a discussion  
22 regarding the appropriate commentary to the jury on this issue.  
23 I'd like to hear proposals from each of the parties.

24 Counsel, what are your concrete proposals regarding  
25 statements that I might appropriately make under these

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1 circumstances?

2 First, let me hear from counsel for defendants.

3 MR. SIDDIQI: Can we have a moment to confer, your  
4 Honor.

5 THE COURT: Yes.

6 MS. GOYKADOSH: Thank you, your Honor.

7 THE COURT: And counsel, if you'd like, I could step  
8 down for 10 minutes to let the parties develop your respective  
9 positions. I'd be happy to do that. I have one comment, which  
10 is that I have a criminal sentencing in this room at 4 p.m., so  
11 we'll need to move some of you before then.

12 MR. SIDDIQI: Your Honor, I don't think we need more  
13 than five minutes, but we do appreciate the opportunity.

14 THE COURT: That's fine. I'll step down for 10  
15 minutes. Please develop proposals, both defendants and  
16 plaintiff, and then I will come back and we'll discuss your  
17 concrete proposals. To the extent that you have the  
18 opportunity to do so, I would encourage you to discuss your  
19 alternatives with your adversary.

20 MS. GOYKADOSH: Thank you, your Honor.

21 May Captain Bell and Officer Mitchell leave for the  
22 day?

23 THE COURT: Yes. You're both excused. Thank you.  
24 Assuming you wish to be excused. You're welcome, of course, to  
25 be here throughout the course of whatever of the proceedings

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1 you wish.

2 I'll step down, and I'll see you momentarily.

3 ALL COUNSEL: Thank you, your Honor.

4 (Recess)

5 (In open court)

6 THE COURT: Thank you. Please be seated.

7 So counsel, we're back on the record after a recess to  
8 permit the parties an opportunity to consider alternative  
9 statements that the Court can make to the jury in order to  
10 address the concerns articulated by defendants, and that I  
11 elaborated on before the break.

12 Counsel, have you made any progress in that regard?

13 MR. SIDDIQI: Your Honor, there is no agreement. We  
14 have our version -- I have it written legibly for the Court --  
15 but we don't have an agreement between parties.

16 THE COURT: That's fine. If you would, please hand  
17 forward your proposal.

18 Counsel for plaintiff, to the extent you have a  
19 proposal, would you also please hand it forward. I'll read it  
20 into the record just for the sake of all.

21 MR. LICHTMACHER: My proposal -- I'll do it orally --  
22 is that nothing be said to them. And I base it on 12-CV-6911.  
23 Judge Abrams, that's what she did in *Soto*. I had the wonderful  
24 fortune of having my client not show up in that matter. And  
25 that was an extremely serious injury matter. Not that it

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1 matters. But the way Judge Abrams chose to handle it was to  
2 say nothing about it. And I think the inference is so bad from  
3 him not being here, I think it's piling on to read anything  
4 else about it. And especially under these circumstances,  
5 because let's remember, there was, according to him, a problem  
6 with him showing up that he thought he would lose his jewelry.  
7 So it's not like he had absolutely no reason. Now was it  
8 necessarily a rational, you know, sympathetic reason? Maybe  
9 not. But nevertheless, it is a reason in his mind, and for  
10 that reason, he should get some deference, because the  
11 inference is going to be horrible, and the prejudice to him and  
12 his trial by him not being here is obviously enormous, as  
13 evidenced by the fact that I can't get in so many exhibits,  
14 your Honor.

15 THE COURT: Thank you.

16 MS. GOYKADOSH: Your Honor --

17 THE COURT: Sorry. Let me just comment briefly.

18 The circumstances here I think are complicated by my  
19 prior instructions to the jury. They were I believe correct  
20 and proper under the circumstances. But I am concerned that  
21 the jury may be confused by my instruction that they are to  
22 draw no adverse inference against him as a result of his  
23 failure to appear. Why am I so concerned? Principally  
24 because, while plaintiff has no obligation to appear to  
25 testify, the jury must evaluate his case based on the evidence

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1 or lack of evidence, and I'm afraid that they may confuse the  
2 instruction that they are not to take his absence against him  
3 here to be a refutation of the basic constraint that he must  
4 prove his case based on the evidence or lack of evidence and  
5 that the jury must evaluate it based on the lack of evidence.  
6 In other words, to put it even more simply, I am afraid that  
7 they will understand me to have said that his lack of evidence  
8 here is excused because I've told them that they cannot hold  
9 his absence here against him in any way. That fundamental  
10 concern leads me to conclude that some statement is necessary.  
11 I understand that to be the motivating force behind defendants'  
12 concern. I want to frame it in a way that is as neutral as  
13 possible, but I fundamentally agree with the defendants that  
14 that prior set of instructions could lead a reasonable juror to  
15 infer that they are not supposed to hold against the plaintiff  
16 the lack of evidence -- namely, the lack of his testimony --  
17 and that is something that the defendants rightfully request I  
18 correct.

19 Let me just read into the record what the defendants'  
20 proposed instruction is, then I will comment further or perhaps  
21 propose an alternative.

22 "I have previously instructed you that plaintiff was  
23 not present by no fault of his own. Since I gave you those  
24 instructions, the factual circumstances regarding plaintiff's  
25 absence have changed. I'm informing you that yesterday (and

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1 today) plaintiff had the opportunity to appear for trial but  
2 refused to appear. Therefore, you may draw any inference or  
3 conclusion that stems from the plaintiff's refusal to appear  
4 for his trial."

5 If you'd give me a moment, I'd like to see if I can  
6 take a few moments to develop an alternative to this.

7 Thank you. So let me read you a brief proposed  
8 alternative instruction. It would read as follows:

9 "During jury selection and at the outset of trial  
10 yesterday, I instructed you that plaintiff was not present at  
11 trial through no fault of his own and that you were not to hold  
12 that fact against him in any way, nor were you to speculate  
13 regarding the reasons for plaintiff's absence. I'm now  
14 modifying that instruction as follows:

15 "Plaintiff has chosen not to appear to provide  
16 testimony in this case. A plaintiff in a civil trial is under  
17 no obligation to provide testimony in support of his case. He  
18 may instead choose to prove it through other evidence.  
19 However, you should evaluate the claims asserted by plaintiff  
20 in light of the evidence or lack of evidence presented at  
21 trial."

22 Thank you. I'm going to modify that briefly.

23 MR. LICHTMACHER: Your Honor, if I may.

24 THE COURT: Thank you. Give me one moment.

25 MR. LICHTMACHER: Sure.

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1 THE COURT: The last sentence would read instead:  
2 "However, you may consider both the evidence as well as any  
3 perceived lack of evidence presented by plaintiff in evaluating  
4 the merits of his claim."

5 So just to read the substance of it again without the  
6 introductory remarks, it would read:

7 "Plaintiff has chosen not to appear to provide  
8 testimony in this case. A plaintiff in a civil trial is under  
9 no obligation to provide testimony in support of his case. He  
10 may instead choose to prove it through other evidence.  
11 However, you may consider both the evidence as well as any  
12 perceived lack of evidence presented by plaintiff in evaluating  
13 the merits of his claims."

14 In other words, I'm trying to clarify the basic issue  
15 that I've identified earlier without saying that he refused to  
16 appear or suggesting that they can draw an adverse inference  
17 from the fact that he refused to appear here. And I want to  
18 make sure that it's clear to them that they can consider the  
19 lack of evidence in evaluating the claims. I just give you  
20 that alternative. I invite argument regarding either that  
21 proposal, the defendant's original proposed instruction, or  
22 what I understand to be plaintiff's initial position -- namely,  
23 that we provide no commentary at all.

24 Counsel for plaintiff.

25 MR. LICHTMACHER: I think it's too strong, your Honor,



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1 and even though in the beginning -- it's got to be clear in the  
2 beginning. The first two days he had a legitimate excuse for  
3 not showing up, and it's got to be made clear about that. The  
4 third day he had a perceived excuse, which may be borderline,  
5 you know, may or may not be believed, but nevertheless, it was  
6 more in his corner. It may or may not be believed, but  
7 nevertheless, he sensed a detriment to himself by coming to  
8 court, because he did, because of the property. So he did  
9 sense that, and I don't think that should be left out.

10 THE COURT: Thank you.

11 Should I also include that he cursed at the Marshals  
12 and threatened them?

13 MR. LICHTMACHER: I know you're being facetious.

14 THE COURT: I am being facetious, but the point is  
15 that once I get into the circumstances underlying his choice  
16 not to appear here, it raises a question regarding me providing  
17 some kind of normative evaluation of the rationale for his  
18 choice not to appear. The language that I've selected instead  
19 was selected in order to be very neutral. It simply says,  
20 "Plaintiff has chosen not to appear to provide testimony in  
21 this case," without saying whether or not he had a good reason  
22 to do so, whether or not he did so in a diplomatic way, whether  
23 or not he did so in a way that might lend credence to the  
24 officer's version of the events and the story.

25 So the question that I would have is, to the extent

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1 that I were to provide additional facts related to his  
2 justification for his failure to appear, how it would be that I  
3 would cull them in a way that would be anything other than me  
4 importing normative views regarding the nature of his choice,  
5 something that I'm hesitant to do on the basis of the  
6 information that I have presented to me. I raised that example  
7 in a way that was facetious, as you described, but to  
8 illustrate the challenge presented to the extent that the  
9 request is that I provide the jury with an explanation of  
10 Mr. McCurdy's conduct, as part of this instruction.

11 MR. LICHTMACHER: Well, in that case, if you're  
12 reluctant to do that, your Honor, distinguish the first two  
13 days where he was willing to come to court, it was beyond his  
14 control, and was only the third day, you know, I mean -- what  
15 is today, the second or third day? I'm tired. We're at two  
16 days of trial. I'm sorry. It's the second day. The first  
17 day -- I'm exhausted.

18 You know, the first day was beyond his control. How  
19 about if we say the first day was beyond control, he was  
20 faultless, and the second day was not? Because it would be  
21 somewhat misleading to think like the whole time he didn't want  
22 to come.

23 THE COURT: Thank you.

24 Give me one moment, please.

25 MR. LICHTMACHER: Thank you, your Honor.

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1 THE COURT: I could modify it as follows. I will not  
2 repeat the initial two sentences of the instruction, but the  
3 following sentences would read as follows:

4 "I'm now modifying that instruction as follows:

5 "That instruction was accurate at the time that I  
6 provided it to you. However, yesterday, during the course of  
7 trial, plaintiff affirmatively chose not to appear to provide  
8 testimony in this case. A plaintiff in a civil trial is under  
9 no obligation to provide testimony in support of his case -- he  
10 may instead choose to prove it through other evidence.  
11 However, you may consider both the evidence as well as any  
12 perceived lack of evidence presented by plaintiff in evaluating  
13 the merits of his claims."

14 Counsel, does that address the request?

15 MR. LICHTMACHER: It's an improvement, your Honor, but  
16 frankly, I think that if there could be some language in there  
17 that says like -- it's not like he wasn't threatened to be  
18 harmed if he came to court. In his warped view of the world,  
19 which it may be the way he views things, you know, he was going  
20 to lose his jewelry if he showed up to court. So is that a  
21 bogus excuse? Only he knows for sure. But nevertheless, it is  
22 something tangible. And the jury could be given a little piece  
23 of that; if not that specifically, just the idea that there may  
24 have been a mitigating circumstance, at least in his mind, you  
25 know, subjectively, if not objectively. That might be the way

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1 to put it. Subjectively, he perceived himself through possibly  
2 internal harm if he showed up to court. Objectively -- and I'm  
3 sure you don't want to say it. Objectively, most of us would  
4 not agree with that assessment of the situation. Something  
5 like that would be --

6 I'm sorry. I didn't mean to interrupt, Omar.

7 MR. SIDDIQI: No, that's fine.

8 MR. LICHTMACHER: -- would be palatable for  
9 plaintiffs.

10 MR. SIDDIQI: I have comments. I don't remember any  
11 communications that the Court has provided to us that there was  
12 any motive for plaintiff not providing his jewelry, that he  
13 thought he was going to lose it, simply that he did not want to  
14 comply with the rules to check in his jewelry. I don't  
15 remember hearing anything with regards to him having a fear  
16 that he would lose it or it would be stolen.

17 THE COURT: Thank you. There was no specific  
18 statement regarding the state of mind of the plaintiff when he  
19 chose to act as he did.

20 MR. LICHTMACHER: Your Honor, that is implicit in that  
21 statement, though.

22 THE COURT: Thank you. It may be.

23 Counsel for defendants, please proceed.

24 MR. SIDDIQI: Your Honor, the only other comment I  
25 would have is that I believe that the initial comments that

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1 your Honor made to the jury implied that there was some sort of  
2 an encumbrance to plaintiff. I believe that a jury could  
3 fairly draw the conclusion that plaintiff may have been ill or  
4 very well may have been incarcerated, and I just want to make  
5 clear in the statement that we're going to make now that there  
6 was no -- at the current time there is no such encumbrance on  
7 plaintiff and that there is nothing preventing him in any way  
8 from coming to trial. My only concern is to rebut any  
9 presumption of an encumbrance that was indicated by the special  
10 instructions given by the Court.

11 MR. LICHTMACHER: That kind of wipes out what I'm  
12 trying to get in there, your Honor, if the Court accepts that.  
13 I mean, it may be a bad excuse, but it's not no excuse. It's  
14 not as if, you know, he just said, well, I don't feel like  
15 going to court today, you know, and his perception may be  
16 warped, but nevertheless, it's his perception.

17 MR. SIDDIQI: Your Honor, just to add to that, it's  
18 our position that if any portion of the facts that have been  
19 given to the Court underlying plaintiff's refusal comes in,  
20 then all of those facts should come in, that they should not be  
21 selectively culled.

22 THE COURT: Thank you.

23 MR. LICHTMACHER: It's a lot more prejudicial,  
24 threatening to beat up a correction officer, than it is to  
25 explain why he didn't want to come to court. That's after the

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1 fact.

2 THE COURT: Thank you.

3 I am concerned about editing the facts that led to  
4 plaintiff's decision here not to appear. It may be, as counsel  
5 for plaintiff has suggested, that the logic behind his conduct  
6 is implicit in the conduct itself. But I hesitate to infer  
7 that his conduct was motivated by those instincts and nor to  
8 justify that conduct. It's not completely clear from the  
9 information that has been provided to me that his conduct was  
10 justifiable to the extent that he threatened security officers  
11 and exhorted them with verbal abuse.

12 I'd be happy to include a statement that he  
13 affirmatively chose not to appear to provide testimony for  
14 reasons which are known to him, or something along those lines,  
15 or as to which the Court will not speculate. But I'm unwilling  
16 to provide, I'll call it justification for plaintiff's conduct  
17 because I am not the plaintiff and don't believe that I have  
18 adequate information from which I can infer that rationale. As  
19 a result, my strong inclination is to provide the jury with a  
20 very neutral statement regarding the fact that he chose not to  
21 appear to provide testimony here and then to let them know they  
22 can evaluate the lack of evidence in assessing his claims.

23 So I'm going to deny the plaintiff's request to  
24 include I'll call it a normative explanation for the  
25 plaintiff's decision-making which led to his choice not to

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1 appear here for the reasons that I've just described.

2 As I said, counsel for plaintiff and defendants, I'd  
3 be happy to insert some statement regarding his rationale --  
4 namely, for reasons about which the Court cannot speculate --  
5 but beyond that, I'm hesitant to speculate regarding the  
6 rationale for his conduct, and I'm not sure that that addition  
7 would be beneficial.

8 Counsel for plaintiff, would such an addition be  
9 beneficial?

10 MR. LICHTMACHER: It might be. It might be. I mean,  
11 it would -- it's better than no explanation at all, your Honor.

12 THE COURT: Thank you. Good.

13 Counsel for --

14 MR. LICHTMACHER: I'm not trying to be facetious  
15 either. You know, I mean, when you understand that this is not  
16 the most mainstream person on the planet, I get that, you know,  
17 and I know the Court gets it, and the defendants get it. You  
18 know, however, there is a subjective aspect --

19 Do you mind if I remain seated, your Honor?

20 THE COURT: That's fine. I know you have some health  
21 concerns.

22 MR. LICHTMACHER: Thank you.

23 There is an aspect to this which may not fully justify  
24 it, but, you know, it should be given even an iota of  
25 deference. You know, I mean -- and the other thing is his lack

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1 of trust for correction officers. Who's to say it doesn't  
2 emanate from this incident? You know, I know you're not going  
3 to tell the jury that, and I'm not asking you to, but, you  
4 know, who knows. Looking at it objectively, from his life  
5 experiences, he may think anyone he leaves this jewelry with is  
6 going to steal it. Now is his perspective correct? I doubt  
7 it, in the case of BOP. I admit that. But nevertheless it's  
8 him making the irrational decision, not one of us.

9 THE COURT: Thank you. Good. Understood.

10 Counsel for defendants, any additional comments  
11 regarding the language that I have just proposed?

12 MS. GOYKADOSH: So will the Court be including the  
13 language "for reasons that the Court will not speculate"?

14 THE COURT: "As to which the Court cannot speculate."

15 MS. GOYKADOSH: "As to which the Court cannot  
16 speculate"? We have no problem with that, your Honor.

17 THE COURT: Thank you. So let me read to you the  
18 entirety of the proposed comment then. It would read as  
19 follows:

20 "During jury selection and at the outset of trial  
21 yesterday, I instructed you that plaintiff was not present at  
22 trial through no fault of his own and that you were not to hold  
23 that fact against him in any way, nor were you to speculate  
24 regarding the reasons for plaintiff's absence. I'm now  
25 modifying that instruction as follows:



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1           " That instruction was accurate at the time that I  
2       provided it to you. However, yesterday, during the course of  
3       trial, plaintiff affirmatively chose not to appear to provide  
4       testimony in this case for reasons as to which the Court cannot  
5       speculate. The plaintiff in a civil trial is under no  
6       obligation to provide testimony in support of his case. He may  
7       instead choose to prove it through other evidence. However,  
8       you may consider both the evidence as well as any perceived  
9       lack of evidence presented by plaintiff in evaluating the  
10      merits of his claims."

11           Counsel, any further comments regarding that proposed  
12      text? First, counsel for plaintiff.

13           MR. LICHTMACHER: Well, you know my objections, your  
14      Honor. It's preferable to what we started with, and, you know,  
15      I understand the Court is trying to be fair. I'm not  
16      commenting on the Court or inferring there's any lack of  
17      fairness from the Court. Sincerely, I would just hope that  
18      somebody would try to, you know, take in my subjective, warped  
19      view of the world as it is, you know, and he should be given  
20      even an iota of deference for that, even if it's wrong.

21           THE COURT: Thank you.

22           I can reassure you that that is happening in my mind.  
23      I'm hesitant to present it to the jury, however.

24           Counsel for defendants, any additional comments on the  
25      proposed instruction?

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1 MR. SIDDIQI: Your Honor, just if he doesn't show up  
2 tomorrow, that it would also include tomorrow in the time  
3 recitation.

4 MR. LICHTMACHER: I don't know if it's legally  
5 possible to get him tomorrow, your Honor. I already started  
6 making attempts, but I don't know if it's legally possible.

7 THE COURT: Thank you.

8 Counsel, I'm not sure where I would add that. Where  
9 would you have me add it? I know that you have only heard me  
10 read it and don't have the physical text in front of you. Can  
11 you tell me what you propose for me to modify, however.

12 MR. SIDDIQI: Your Honor, I believe it's either right  
13 before or right after the clause that says "affirmatively  
14 chosen." I think this would be somewhere over there where you  
15 say "over the course of events yesterday."

16 THE COURT: Thank you. I had said, "However,  
17 yesterday, during the course of trial, plaintiff affirmatively  
18 chose."

19 MR. SIDDIQI: So I would say, "Yesterday, over the  
20 course of trial, and today, has affirmatively chosen."

21 MR. LICHTMACHER: We don't know if he's choosing  
22 tomorrow.

23 THE COURT: Thank you.

24 I decline to make that change. Plaintiff specifically  
25 did not present here in order to give testimony. I think

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1 that's accurate.

2 Good. Anything else from counsel for defendants?

3 MS. GOYKADOSH: On this issue or --

4 THE COURT: Yes, on this issue, and then we can  
5 proceed to any other issues you want to discuss.

6 MS. GOYKADOSH: No, your Honor.

7 THE COURT: Good. Thank you.

8 So thank you very much, counsel, for helping us work  
9 through this issue.

10 Counsel for defendants, any other issues that you'd  
11 like to discuss at this time?

12 MS. GOYKADOSH: Yes, your Honor. Two very brief  
13 issues.

14 First of all, if plaintiff does show up tomorrow, in  
15 the cross-examination, I do intend to ask him about his refusal  
16 to appear today, and I just wanted to run that by the Court so  
17 that I can plan accordingly.

18 THE COURT: Thank you. Let's take that up if and to  
19 the extent it becomes an issue. I'm not sure that that's a  
20 fruitful use of our time to discuss that --

21 MS. GOYKADOSH: Thank you, your Honor.

22 THE COURT: -- given the facts that we have now.  
23 Still, I'd be happy to hear from you tomorrow regarding the  
24 purpose to which such line of questioning would be put.

25 MS. GOYKADOSH: Thank you, your Honor.

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1           And then the second question is just, we are  
2           proceeding with the assumption that we should be prepared to  
3           sum up tomorrow, and I just wanted to confirm with the Court if  
4           that assumption is the correct one.

5           THE COURT: Yes.

6           MS. GOYKADOSH: Thank you, your Honor.

7           THE COURT: I'm sorry. Let me just make a brief  
8           comment regarding the question about summing up. This is very  
9           straightforward. I have some notes about opening statements,  
10          but let me just say the most important thing about closing  
11          arguments.

12          Remember, closing arguments permit the parties to draw  
13          inferences from the evidence that has been admitted, not to  
14          comment on evidence that was omitted. So to be very clear, I  
15          will not permit arguments regarding information, evidence that  
16          was expected to be put before the jury that was not, and so I  
17          just want to be very clear that closing arguments should be  
18          focused on the claims as they have been proven or not proven by  
19          the evidence in the case. Counsel should not attempt to  
20          testify through the closing arguments. You should expect that  
21          I will police any such an effort very carefully.

22          MS. GOYKADOSH: Your Honor?

23          THE COURT: Yes.

24          MS. GOYKADOSH: Just to avoid any misunderstanding by  
25          me, does that mean that I can say to the jury that plaintiff

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1 didn't appear and that they can infer from that what they may?  
2 I believe that would not violate the Court's current  
3 instruction.

4 THE COURT: Yes. You would certainly be permitted to  
5 say that plaintiff did not appear and did not present any of  
6 the evidence that you heard during the opening statements.

7 MS. GOYKADOSH: Thank you.

8 THE COURT: Remember the judge's instructions that  
9 statements by counsel are not facts in evidence. You are to  
10 decide this based on the evidence. All of those things would  
11 be within bounds.

12 MS. GOYKADOSH: Thank you, your Honor.

13 THE COURT: Good. Thank you.

14 Anything else that we should take up now? Counsel for  
15 defendants?

16 MR. SIDDIQI: Your Honor, I just would quickly like  
17 to, for the record, renew our application to have this action  
18 dismissed pursuant to Rule 41(b) based on plaintiff's refusal  
19 to appear.

20 THE COURT: Thank you. Good.

21 Counsel for plaintiff, any argument with respect to  
22 that further application?

23 MR. LICHTMACHER: Yeah, that as you cited repeatedly,  
24 plaintiff does not have to show up in a civil case in order to  
25 present his case. So the case has been presented. Hopefully

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1 it will be presented in more detail tomorrow, but I doubt it,  
2 for the reasons we discussed ad nauseam.

3 I would like to know who the defense are going to put  
4 on tomorrow.

5 THE COURT: Thank you.

6 (Continued on next page)

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1 THE COURT: Thank you. Let me just rule on this  
2 motion first, and then we will hear from defendants whether and  
3 to what extent they expect to put on a case in the event that  
4 Mr. McCurdy fails again to appear here.

5 Now, counsel for defendants have made an application  
6 that I dismiss this case because plaintiff has failed to appear  
7 to testify. I'm denying that motion. Rule 41(b) permits  
8 involuntary dismissal, amongst other things, if the plaintiff  
9 fails to prosecute or to comply with these rules or a court  
10 order.

11 In this instance, while the plaintiff himself has  
12 chosen not to appear to support his claims, the plaintiff  
13 through counsel is still prosecuting the case. They have  
14 called two witnesses. They have introduced documents, and they  
15 are proceeding to litigate the case. There is a strong  
16 preference in the Circuit to decide cases on their merits, and  
17 at this point plaintiff, or at least plaintiff through his  
18 authorized representative, is actively seeking to pursue his  
19 claims.

20 So while it may be that ultimately in the absence of  
21 plaintiff's direct testimony those claims may be found by the  
22 trier of fact to lack merit, it's not a sufficient  
23 justification for me to dismiss the case for failure to  
24 prosecute. Presence of counsel and his efforts here throughout  
25 the course of trial the last two days suggest that plaintiff's

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1 authorized representative is undertaking substantial efforts to  
2 prosecute his client's claims. So I deny the application for  
3 that reason.

4 Counsel for plaintiff, anything else that we should  
5 talk about?

6 MR. LICHTMACHER: Nothing further. Just who the  
7 witnesses are for tomorrow.

8 THE COURT: Thank you.

9 Counsel for defendants, let's discuss this question  
10 in, I'll call it, two states: First, in the event that  
11 Mr. McCurdy chooses again not to appear tomorrow, do you  
12 anticipate that you will be calling additional witnesses?

13 MR. SIDDIQI: No, your Honor. We would adopt the  
14 testimony of the two witnesses, and our only portion of our  
15 case in chief would be to read portions of the medical record  
16 into the record.

17 THE COURT: Thank you. Good.

18 Counsel for defendants, in the event that Mr. McCurdy  
19 does choose to testify and appears here at the outset of the  
20 trial day or close enough to it that it will not result in a  
21 substantial misuse of the Court's and the jury's time, do you  
22 anticipate that there be additional witnesses who you'll be  
23 calling as part of your case in chief? In other words,  
24 plaintiff would not be resting, so it may be premature for you  
25 to comment, but please let me know to the extent you can



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1 provide any feedback.

2 MR. SIDDIQI: Your Honor, at this point I can only see  
3 us calling rebuttal witnesses from Officer Mitchell and Captain  
4 Bell.

5 THE COURT: Thank you very much.

6 So, Counsel, you should be prepared to sum up in the  
7 event we don't have additional information regarding  
8 Mr. McCurdy such that plaintiff is in a position where he must  
9 rest. Then I expect that I would provide the jurors with that  
10 instruction shortly before or immediately after plaintiff  
11 rests. Defendant would then begin its case in chief, and then  
12 we would hear whether there are any applications. And to the  
13 extent there are no applications, we would submit the case to  
14 the jury as to the defendants. Good. So thank you very much.

15 Counsel, let me just ask, Mr. Lichtmacher in  
16 particular, I'd like to ask you to please clear your table so  
17 that the people who will be coming forth in the incoming matter  
18 can use that space. Counsel for plaintiff, if you wish, I will  
19 be locking the courtroom after the next proceeding. I don't  
20 know whether you've left your things here in the past. If you  
21 wish, you can simply move them to the side, but I need to ask  
22 that the back table be completely clear.

23 MR. LICHTMACHER: Absolutely, your Honor.

24 THE COURT: Good. So thank you all very much.

25 I will see you all here tomorrow morning at 9:00 a.m.

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1 Good luck, Mr. Lichtmacher, in getting your client here.

2 This proceeding is in recess. I'll see you in the  
3 morning.

4 (Trial continued on September 5, 2019 at 9:00 a.m.)  
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